Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States
October Term, 1998

UNITED STATES OF AMERICA,
Respondent,

v.

DAYS INNS OF AMERICA, INC.
AND HFS INCORPORATED,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether liability for violation of the specific prohibitions contained in Section 303 of the Americans With Disabilities Act concerning accessibility of newly constructed facilities to persons with disabilities is limited, as is liability for violations of the specific prohibitions contained in Section 302(b) of the Act, to persons who "own, lease (or lease to), or operate" covered facilities.

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Days Inns of America, Inc., and HFS Incorporated[1] respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Appendix ("App.") at B-1) is reported at 151 F.3d 822 (8th Cir. August 6, 1998). The opinion of the lower court (App. at C-1) is unreported.

JURISDICTION

The court of appeals entered judgment on August 6, 1998, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 303 of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12183, which provides, in pertinent part:

> [A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) [42 U.S.C. §12182(a)] includes (1) a failure to design and construct facilities for first occupancy later than 30 months after the date of

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[1] HFS Incorporated, the former parent of Days Inns of America, Inc., was dissolved in 1997 as the result of a merger with CUC International, Inc., and is now known as Cendant Corporation. Days Inns of America, Inc., is a wholly-owned subsidiary of Cendant Corporation. The United States of America is represented in this action by Gregory Friel, Department of Justice, P.O. Box 66078, Washington, D.C. 20035-6078. Mr. Friel's telephone number is 202-514-3876.

> enactment of this Act [enacted July 26, 1990] that are readily accessible to and usable by individuals with disabilities. . . .

(App. at A-1.)

Section 302(a) of the ADA, 42 U.S.C. § 12182(a), which provides:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(App. at A-4.)

STATEMENT OF THE CASE

Days Inns of America, Inc. ("DIA") is the licensor of Days Inn® guest lodging facilities throughout the United States, including the Days Inn® facility located in Wall, South Dakota ("the Wall Facility"). DIA does not own, operate, or lease any lodging facilities. Instead, DIA enters into license agreements with persons or entities who own, operate, or lease such facilities, permitting them to use DIA's national reservation system, service marks, marketing systems, and other franchise support services. In exchange for the rights granted under the license agreements, licensees agree to pay to DIA certain royalties and fees and agree to maintain certain minimum system standards during the term of the agreement.

Congress passed the ADA in 1990 to prohibit discrimination based on disability in employment, public services, and public accommodations. Title III of the ADA addresses discrimination in public accommodations and commercial facilities, including motels, restaurants, theaters, stadiums, museums, libraries, and daycare centers. Among Title III's requirements are certain provisions that obligate owners, operators, lessors, and lessees to make facilities accessible to persons with disabilities. Here, the ADA distinguishes between facilities that existed at the time the Act was enacted and "new construction," defined as facilities designed and constructed for first occupancy more than thirty months after the Act's adoption, or after January 26, 1993. Section 302 of the Act applies to existing places of public accommodation and requires, among other things, the removal of architectural barriers where removal is "readily achievable." 42 U.S.C. § 12182(b)(2)(iv). Section 303 requires that newly constructed places of public accommodation and "commercial facilities," which are defined more broadly to include not just places of public accommodation but all nonresidential facilities that affect commerce, be designed and constructed so as to make those facilities "readily accessible" to persons with disabilities.

On February 8, 1996, the Department of Justice ("DOJ") commenced this action against DIA, as well as against the architect who designed the Wall Facility, the contractor who constructed the Facility, and the owner of the Facility.[2] Because the Wall Facility was designed and constructed for first occupancy after January 26, 1993, DOJ based its claims solely on the "new construction" provisions contained in Section 303 of the ADA. In support of its claim that HFS and DIA had violated Section 303, DOJ alleged that HFS and DIA

[2] By Consent Decree approved by the trial court, the owner, the architect, and the contractor reached a settlement with DOJ.

had controlled or participated in the design and construction of the Wall Facility as a result of their promulgation of design standards for the construction of licensed facilities and their review of plans prior to construction.

After the completion of discovery, DIA moved for summary judgment on the ground, among others, that liability under Section 303 is limited, as it is under Section 302, to entities that own, operate, or lease covered facilities. The district court did not reach the statutory construction issue, but did grant summary judgment in favor of HFS and DIA, finding that neither HFS nor DIA had designed, constructed, or operated the Wall Facility. On appeal, the Eighth Circuit reversed in part, finding that, although neither HFS nor DIA had operated the Wall Facility, liability under Section 303 is not limited to entities that own, operate, or lease facilities. The Eighth Circuit held that DIA and HFS had sufficient control over the design and construction of the Wall Facility to give rise to liability under Section 303 and that DIA and HFS were liable to the extent they had "actual knowledge" of ADA violations at the Facility. The Eighth Circuit further ordered that the matter be remanded to the district court to determine whether DIA and HFS had actual knowledge of the violations. DIA and HFS, by this Petition, seek review of the Eighth Circuit's decision concerning the identity of parties who may be held liable under Section 303.

REASONS FOR GRANTING THE PETITION

I. The Identity Of Parties Liable Under Section 303 Of The Americans With Disabilities Act Is An Important Question Of Federal Law That Has Not Been, But Should Be, Settled By This Court

This case presents an important and recurring question of federal statutory interpretation. The Americans With Disabilities Act is a federal civil rights statute of far-reaching national importance and great public interest. The ADA's self-described purposes include providing "**clear, strong, consistent, enforceable standards** addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2) (emphasis added). Section 303 of the statute, which gives rise to this Petition, is applicable to all "places of public accommodation" as well as all "commercial facilities," which are defined broadly to include all nonresidential facilities that affect interstate commerce. The specific prohibitions of Section 303 apply to "new construction," which includes places of public accommodation and commercial facilities that are designed and constructed for first occupancy after January 26, 1993. 42 U.S.C. § 12183. In order to give effect to the purposes of the Act, it is critical that there be a clear and definitive answer to the threshold question, "Who is liable under Section 303?"

Whether liability under Section 303 is limited to owners, operators, lessors, and lessees is a substantial question of statutory construction on which the federal courts have reached opposite conclusions. This case is one of five cases brought by DOJ against DIA alleging that DIA is liable for violations of Section 303 at licensed lodging facilities. Other cases are venued in California, Illinois, Kentucky, and Indiana. In the California case, the Federal District Court for the Eastern District of California granted DIA's motion for

summary judgment holding, as a matter of law, that DIA was not liable because liability under Section 303 is limited to entities that own, operate, or lease a place of public accommodation or commercial facility. *United States v. Days Inns of America, Inc.*, CIV S-96-260 WBS/GGH (E.D. Cal. January 12, 1998), slip op. (A copy of the California district court's decision is contained in the Appendix at D-1.) That decision is now on appeal to the Ninth Circuit.[3] In the Illinois case, the Federal District Court for the Central District of Illinois granted partial summary judgment in favor of DOJ, finding that DIA was liable, either as an operator of the facility at issue in that case or as a party who designed and constructed the facility, and set for trial the issue of remedies. *United States v. Days Inns of America, Inc.*, 997 F. Supp. 1080 (C.D. Ill. Mar. 16, 1998). (A copy of the Illinois district court's decision is contained in the Appendix at E-1.) In the Kentucky case, the court granted DIA's motion for summary judgment, holding, like the California court, that the provision of Section 302 that limits liability to owners, operators, lessors, and lessees of covered facilities applies as well to Section 303. *United States v. Days Inns of America, Inc.*, Civil Action No. 96-26 (E.D. Ky. September 30, 1998), slip op. (A copy of the decision of the Kentucky district court is contained in the Appendix at F-1.)[4]

In addition to this case and the related cases brought by DOJ against DIA, other lower courts have also addressed the scope of liability under Section 303, also with inconsistent results. For example, in *Paralyzed Veterans of America v.*

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[3] As of the filing of this Petition, briefing on the appeal to the Ninth Circuit is not complete and the matter has not yet been scheduled for oral argument.

[4] The Indiana case has been stayed by agreement of the parties. *United States v. Days Inns of America, Inc.*, File No. EV-96-28-C (S.D. Ind.).

Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1, 2 (D.D.C. 1996), the lower court held that Section 302's identification of liable parties as owners, operators, lessors, and lessees also applies to Section 303 and, therefore, an architect could not be held liable under Section 303 for "failure to design" an accessible facility. In contrast, the courts in *Johanson v. Huizenga Holdings*, 963 F. Supp. 1175, 1178 (S.D. Fla. 1997), and *United States v. Ellerbe Becket, Inc.*, 976 F. Supp. 1262, 1268 (D. Minn. 1997), held that liability under Section 303 is not limited to owners, operators, lessors, and lessees and that architects could be liable.

Whether liability under Section 303 is limited to owners, operators, lessors, and lessees is a question whose answer has implications far beyond this specific case. The issue presented by this case is important, not just to DIA and the Days Inn® franchise system, but to franchisors generally. Because franchisors have a responsibility under the Lanham Act to maintain the quality, consistency, and uniformity of goods and services offered under a licensed tradename, and because the appearance of a franchised facility is often part of a franchisor's trade dress, franchisors will often establish standards for construction of franchised facilities and monitor franchisee compliance with those standards. Under the Eighth Circuit's interpretation of Section 303, any franchisor that establishes and enforces construction standards, however unrelated to the requirements of the ADA, opens itself up to potential liability if a franchised facility does not comply with the ADA's accessibility requirements. Moreover, as the cases concerning the liability of architects demonstrate, the impact of this issue is not limited to franchisors. Not only architects, but contractors, lenders, insurers, and others all may have a significant role in the design and construction of a facility and all may be held liable under the Eighth Circuit's interpretation.

Although this case does not reflect a conflict among the decisions of the federal circuit courts of appeals,[5] this Court's previous decisions teach that it is appropriate for the Court to resolve a conflict between a federal circuit court and the federal district courts where such a conflict concerns a legal issue of far-reaching national importance. *See, e.g., Curtis v. Loether*, 415 U.S. 189, 191 n.2 (1974) (certiorari review to resolve conflicting decisions of a federal circuit court and evenly divided federal district courts on the issue of the availability of a jury trial under the Civil Rights Act of 1968); *Massachusetts v. United States*, 435 U.S. 444, 453 (1978) (certiorari review to resolve conflict between federal circuit court and federal district court on issue of constitutionality of federal tax); *Hefron v. Int'l Society for Krishna Consciousness*, 452 U.S. 640, 646 n.9 (1981) (certiorari review to resolve conflict between federal circuit court and federal district court concerning constitutionality of state regulation).

Review by this Court will resolve the confusion that currently exists in the lower courts and avoid further conflict concerning the scope of liability under Section 303. *See Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 185 (1980) (certiorari granted "to forestall possible conflict in the lower courts"). The same issue of statutory construction, involving these same parties, is already pending before the Ninth Circuit and is also very likely to be appealed to the Sixth and Seventh Circuits. In light of the importance of the issue presented, the likelihood that the issue will arise in the

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[5] If, however, the Ninth Circuit, where an appeal is now pending, affirms the decision of the Federal District Court for the Eastern District of California, that decision will be in direct conflict with the decision of the Eighth Circuit. The time for DOJ to appeal the decision of the Kentucky court has not yet run, but an appeal appears likely in that case as well in the near future.

future, and the many conflicting decisions of the lower courts, the need for guidance from this Court is substantial.

II. The Eighth Circuit's Decision On The Scope Of Liability Under Section 303 Is Inconsistent With The Intent Of Congress, As Is Reflected By The Plain Language, Structure, And Legislative History Of The Statute

A. The Plain Statutory Language And Structure Of Section 303 Limits Liability To Persons Who Own, Lease, Lease To, Or Operate A Place Of Public Accommodation Or Commercial Facility

1. Section 303 incorporates the parties liable under Section 302 by its reference back to Section 302(a)

In construing the ADA, this Court must, of course, look first to the plain language of the statute. *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991); *Burlington Northern Railroad Co. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). Where the statute is clear, as is the case here, the Court's duty is to apply that plain language. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982).

Section 302(a) sets out the "general rule" prohibiting discrimination under Title III of the Act:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation **by any person who owns, leases**

> **(or leases to), or operates a place of public accommodation.**

42 U.S.C. § 12182(a) (emphasis supplied). After setting forth the general rule applicable to Title III, the Act goes on to identify specific prohibited conduct. Thus, Section 302(b) describes specific prohibitions that apply to existing construction. In particular, Section 302(b)(2)(A)(iv) requires the removal of architectural barriers from existing facilities "where such removal is readily achievable" (*i.e.*, "easily accomplishable and able to be carried out without much difficulty or expense"). 42 U.S.C. §§ 12181(9), 12182(b)(2)(A)(iv). Section 303, in turn, sets forth the specific prohibitions applicable to "new construction" (facilities designed and constructed for first occupancy more than thirty months after the date of the enactment of the Act). Section 303 requires that newly constructed facilities be "readily accessible" (*i.e.*, comply with detailed accessibility standards developed by the Attorney General). 42 U.S.C. § 12183(a)(1).

Section 303 provides, in relevant part, as follows:

> [A]s applied to public accommodations and commercial facilities, **discrimination for purpose of section [302(a)] of this title includes** a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities.

42 U.S.C. § 12183(a)(1) (emphasis added). In referring back to Section 302, Section 303 makes clear that the prohibitions relating to new construction apply to the same persons as do those of Section 302 -- owners, operators, lessors, and lessees. Although the Eighth Circuit cited the canon that statutory

language is to be interpreted in a manner that gives effect to all terms, it then ignored that rule by effectively reading out of the statute the language "for the purpose of section [302(a)] of this title." If this language is to be given any meaning at all, it must be read to incorporate the identification of liable parties contained in Section 302(a).

A construction that limits liability under Section 303 to owners, operators, lessors, and lessees is also compelled by the general structure of Sections 302 and 303. Subsection (b)(2) of Section 302 describes the specific prohibitions applicable to places of public accommodation:

> **For purposes of subsection (a)** of this section, discrimination includes --
>
> (i) **the imposition or application of** eligibility criteria. . .
>
> (ii) **a failure** to make reasonable modifications in policies. . .
>
> (iii) **a failure** to take such steps as may be necessary to ensure that no individual with a disability is excluded . . .
>
> (iv) **a failure** to remove architectural barriers. . .
>
> (v) . . . **a failure** to make . . . accommodations available through alternative methods.

42 U.S.C. § 12182(b)(2) (emphasis added). Because of the reference back in Section 302(b) to subsection (a), each of these specific prohibitions applies to the actors listed in subsection (a) -- owners, operators, lessors, and lessees.

Section 303 employs the same language and structure as Section 302(b). Like Section 302(b), Section 303 makes it unlawful to fail to do something. Like Section 302(b), Section 303 identifies the parties who are liable for "failure to" do something by referring back to Section 302(a). As with the specific prohibitions contained in Section 302(b), the specific prohibitions contained in Section 303 necessarily apply only to owners, operators, lessors, and lessees by the common reference in both sections to Section 302(a).

The Eighth Circuit's decision improperly construes the reference back language contained in Section 302(b) differently from the identical language contained in Section 303. The decision does not explain, however, why Congress would have used the very same language to mean two different things. There is no question that the reference back language in Section 302(b)(2) incorporates Section 302(a)'s identification of responsible parties. There is no reason to read this language any differently when used in Section 303. *See Commissioner of Internal Revenue v. Lundy*, 516 U.S. 235 (1996) (citing "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning"). Indeed, the Eighth Circuit's failure to construe the law in this manner produces a result that is wholly inconsistent with the purpose of the ADA.

Not only does the Eighth Circuit's construction read certain language out of the law, it reads into the ADA language that Congress did not put there. Had Congress intended for Section 303 to be interpreted in the way that the Eighth Circuit has interpreted it, Congress certainly knew how to say so clearly, as is demonstrated by comparing Section 303 with provisions contained in Title II of the Act. Title II concerns discrimination by public entities. Section 242 of Title II makes it unlawful to build new rail stations that are

not readily accessible to individuals with disabilities. 42 U.S.C. § 12162(e)(1). Section 241 defines "station" as including areas appurtenant to an intercity or commuter rail right-of-way owned by a public entity "to the extent that such public entity **exercises control over the selection, design, construction,** or alteration of the property. . . ." 42 U.S.C. § 12161(6) (emphasis added). The Eighth Circuit has read Section 303 as if it contained similar language, but it plainly does not. Where Congress includes particular language in one section of a statute but omits it in another section, it is generally presumed that Congress acted intentionally. *Rodgriguez v. United States*, 480 U.S. 522, 525 (1987).

2. Limiting liability under Section 303 to owners, operators, lessors, and lessees of newly constructed facilities does not create a "gap" in the coverage of the statute

The Eighth Circuit based its construction of the statute solely on its conclusion that limiting liability under Section 303 to owners, operators, lessors, and lessees would create a "gap" in the coverage of the statute. The court reasoned that incorporating Section 302(a)'s definition of liable parties would limit liability under Section 303 to owners, operators, lessors, and lessees of places of public accommodation, leaving no party liable for violations of accessibility requirements at newly constructed commercial facilities that did not also meet the definition of a place of public accommodation. (App. at B-5.) The Eighth Circuit's analysis is inconsistent with the plain language of the statute.

With the phrase, "[A]s applied to public accommodations and commercial facilities," Section 303 expressly extends the protections against discrimination beyond places of public accommodation to cover commercial facilities as well. The Eighth Circuit's analysis simply ignores this language. The

plain meaning of the phrase "as applied to" is that it makes the new construction obligations set out in Section 303 applicable to public accommodations and commercial facilities, thus avoiding any gap in coverage. This is the analysis that was adopted by the Eastern District of California in holding that liability under Section 303 is limited to owners, operators, lessors, and lessees. As the California court observed:

> [S]ection 303(a) precedes the reference to § 302(a) by stating "as applied to public accommodations and commercial facilities." That phrasing, coupled with the structure of the statute and Congress' clear intent to cover both public accommodations and commercial facilities, demonstrates that § 303(a) incorporates the provisions of § 302(a) without the coverage gap the government attempts to read into Title III. Reading the "as applied to public accommodations and commercial facilities" language before proceeding to § 302(a) eliminates the suggested gap in coverage.

(App. at D-6.) Thus, when the language of the statute is read reasonably, owners, operators, lessors, and lessees of places of public accommodation are responsible for compliance of places of public accommodation and owners, operators, lessors, and lessees of commercial facilities are responsible for compliance of commercial facilities.

3. Use of the phrase "design and construct" in Section 303 was intended to establish when the new construction provisions would apply to facilities constructed after the ADA's effective date, and not to identify liable parties

The Eighth Circuit relied on the "design and construct" language of Section 303 to conclude that parties who design and construct facilities are liable under that Section. Congress did not, however, choose this language to identify liable parties. It, instead, chose this language to do nothing more than create a grace period that allowed owners, operators, lessors, and lessees a transition period in which to conform their conduct to the requirements of the new law. The "design and construct" language reflects a limitation on the application of the new construction provisions. With the "design and construct facilities for first occupancy" language, Congress applied the requirements of Section 303 only to facilities that were **both** designed **and** constructed for first occupancy more than thirty months after the effective date of the Act.

Before the addition of this "design and construct" language, the bill, as originally introduced, made it unlawful to fail "to make facilities constructed for first occupancy thirty months after enactment of this Act readily accessible and usable by individuals with disabilities." (App. at H-6.) Thus, under the statute as it was formerly written, when the facility was designed did not have any "triggering effect" on the application of the Act. Under the original version of the Act, a facility "designed" for occupancy before the thirty-month grace period of the Act, but not fully constructed until after the thirty-month grace period, had to be ADA compliant. The Act was then amended to include "design," as well as "construction," as a triggering event. After the amendment,

the new construction provisions applied only to facilities that were **both** designed **and** constructed for first occupancy after the end of the thirty-month grace period. (App. at H-20.)

The limiting function of the "design and construct" language is reflected in DOJ's own implementing regulations. Based upon the "design and construct" language, DOJ adopted a rule making Section 303 applicable when two conditions are met: First, the application for building permit must be after January 26, 1992, and, second, the first certificate of occupancy must be issued after January 26, 1993, the end of the thirty-month grace period. 28 C.F.R. § 36.410(a)(2). As support for this rule, DOJ explained that "Congress did not contemplate having actual occupancy be the sole trigger for the accessibility requirements, because the statute prohibits a failure to 'design and construct for first occupancy,' rather than requiring accessibility in facilities actually occupied after a particular date." 28 C.F.R. part 36, Appendix B, Section 36.401, New Construction ("DOJ Preamble").[6] In explaining why it chose the date of the application of the building permit as one of the two relevant factors, DOJ stated, "Design is virtually complete at the time an application is complete." (App. at G-4.) Thus, if the building permit is applied for after January 26, 1992, the owner is deemed to have "designed" the building for first occupancy after January 26, 1993. When a facility is first occupied after January 26, 1993, but the building permit was applied for (and the design was, thus, complete) before January 26, 1992, Section 303 is not applicable. Accordingly, DOJ has itself interpreted "design and construct" as determining when the Act would take effect as to any given facility, not, as the Eighth Circuit has held, as determining the identity of potentially liable parties.

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[6] *See* App. at G-3.

B. The Legislative History Compels The Conclusion That Liability Under The New Construction Provisions Is Limited To Owners, Operators, Lessors, And Lessees

1. Sections 302 and 303 originated as part of a single section and were intended to apply to the same parties

An interpretation that holds liable the same parties under Sections 302 and 303 is also compelled by the common legislative history of the two Sections. The new construction requirements set forth in Section 303 were originally a part of what was then called Section 402. S. 933, 101st Cong., 1st Sess. § 24 (1989).[7] Under the original version of the Act, the barrier removal requirements applicable to existing facilities and the requirements applicable to accessibility of newly constructed facilities were in the same section and applied generally to "public accommodations." The term "public accommodation" was, however, more broadly defined than under the Act as ultimately enacted, including both "establishments used by the general public" and also "potential places of employment" (which were later renamed "commercial facilities").[8]

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[7] In the original version of the Act, provisions concerning "Public Accommodations and Services Operated by Private Entities" were included in Title IV. The titles of the Act were later renumbered and Title IV became Title III. *See* App. H-3, H-8.

[8] The phrase "potential places of employment" was later changed to "commercial facilities" to avoid confusion with the parts of the Act dealing with discrimination in employment. H. Rep. No. 485(II) at 117 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 400. (App. at I-1.) The definition of "potential places of employment" under the earlier version is the same as

Congress later changed the definition of facilities that must be ADA compliant. Congress narrowed the definition of a "public accommodation" to a specifically defined group of facilities open to the public, such as restaurants, hotels, motels, and private schools. (App. at H-9.) Congress also created a broader group of facilities subject to only certain aspects of ADA compliance, which included all non-residential buildings whose operations affect commerce (*i.e.* "commercial facilities"). (*Id.*)

In addition to creating two separate categories of facilities, Congress also separated the new construction requirements from the existing construction requirements. Congress amended Section 302 to remove the reference to "commercial facilities" to avoid burdening the broader category of all commercial facilities with the costly barrier removal requirements applicable to existing construction under Section 302. However, "[b]ecause it costs far less to incorporate accessible design into the planning and construction of new buildings," Congress drafted a new section, which became Section 303, governing new construction and made it applicable to both public accommodations and commercial facilities. *See* H. Rep. No. 101-485(III) at 60 (1990), *reprinted in* 1990 U.S.C.C.A.N. at 483.[9]

The Eighth Circuit opinion does not discuss the significance of the common parentage of Sections 302 and 303. Notwithstanding the common origin and structure of these Sections, the Eighth Circuit implicitly concluded that Congress created Section 303 to expand dramatically the parties who may be responsible for ADA compliance of new

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the definition of "commercial facilities" under the Act as finally enacted. 42 U.S.C. § 12181(2).

[9] App. at I-7.

construction. Under the Eighth Circuit test, liability under Section 303 broadly reaches franchisors, insurers, lenders, and others who might potentially be involved in the design and construction of a facility. Although Section 303 applies to a broader scope of facilities than does Section 302 (*i.e.*, commercial facilities in addition to places of public accommodation), the lower court's interpretation ignores how moving the new construction requirements from Section 302 to a separate section, Section 303, in fact, grew solely out of an effort to **limit** liability with respect to the broader category of commercial facilities. Before the creation of a separate section, commercial facilities were subject to all of the same requirements as places of public accommodation. In creating a separate section, Congress removed existing commercial facilities from the obligations created by Section 302, including the obligations to remove architectural barriers. Thus, although the statute requires that newly constructed commercial facilities be made "readily accessible," a commercial facility (that does not also qualify as a place of public accommodation) in existence at the time of the ADA's enactment is not required to remove accessibility barriers.

2. The legislative history shows that Congress intended that public accommodations and commercial facilities would be the parties liable for assuring that facilities comply with the ADA

The legislative history further shows that Congress, in using the phrases "public accommodation" and "commercial facilities," meant for those phrases to include two different concepts: entities and places. Those phrases designate the entities that are responsible for facilities' compliance with the ADA -- owners, operators, lessors, and lessees -- as well as the facilities themselves. In discussing the intent of Section

303(a), the House Report of the Committee on Education and Labor stated:

> Section 303(a) of the legislation specifies that it is unlawful discrimination **for a public accommodation or commercial facility to fail** to design and construct facilities for first occupancy later than 30 months after the date of the enactment of this Act that are readily accessible and usable by individuals with disabilities . . . .

House Report No. 101-485(II) at 117 (emphasis added) (1990), *reprinted at* 1990 U.S.C.C.A.N. at 400.[10] The history of the consideration of the bill by the Senate reflects the same understanding:

> Specifically, section 303(a) of the legislation specifies that it is unlawful discrimination **for a public accommodation or potential place of employment** [later called "commercial facility"] to fail to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities.

Senate Report No. 101-116 at 69 (emphasis added).[11] Plainly the prohibition on failing to design and construct accessible facilities falls on entities -- actors -- not the facilities themselves. The legislative history shows that Congress intended that the entities that would be responsible for compliance would be the public accommodations or

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[10] App. at I-2.

[11] App. at J-5.

commercial facilities themselves (*i.e.* the owners, operators, lessors, and lessees of such facilities), not the entities that are somehow involved in the design and construction of buildings used as places of public accommodations or commercial facilities.[12] In short, the history of these Sections demonstrates that Congress did not intend unlimited liability under Section 303. The enactment of the new construction provisions as a separate section of the ADA reflects an intent to limit, not expand, liability with respect to commercial facilities.

3. Comments by the sponsor of the "owns, leases" (or leases to), or operates" language show that the language was intended to apply to Section 302 and Section 303

The Eighth Circuit's interpretation of Section 303 is also inconsistent with the following comments made during floor debate by Representative Hamilton Fish, New York, who sponsored the amendment language:

> The committee adopted an amendment which clarifies that the prohibition against discrimination "in the full and equal enjoyment of the goods, services facilities, privileges, advantages, and accommodations," applies to "any person who owns, leases (or leases to), or operates a place of public accommodation.

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[12] DOJ, in its regulations, defines "public accommodation" as an actor, and particularly, as an owner, operator, lessor or lessee of a place of public accommodation. 28 C.F.R. 36.104 ("Public accommodation means a private entity that owns, leases (or leases to), or operates a place of public accommodation."). Similarly, when the term "commercial facility" is used to mean an actor, it necessarily means the same kind of actor — an owner, operator, lessor or lessee of a commercial facility.

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> The amendment also makes it clear that the owner and operator of the public accommodation are prohibited from discriminating in accordance with this title. Corporate headquarters would be covered to the same extent as the operator of the accommodation. **For example, corporate headquarters could not continue to design new stores in an inaccessible manner in violation of section 303.**

136 Cong. Rec. H2599-01, H2624. (Emphasis added.)[13] In discussing the amendment language in the context of the liability of a "corporate headquarters" for designing "new stores in an inaccessible manner in violation of section 303," this comment shows that the "owns, leases (or leases to), or operates" amendment applies to the prohibitions of both Section 302 and Section 303. This statement by the sponsor of the "owns, leases (or leases to), or operates" language stands as strong evidence that that language was intended to apply to both Section 302 and Section 303.

4. The "owns, leases (or leases to), or operates" language is part of the general rule of Title III and is, therefore, applicable to all of Title III, including Section 303

Section 302(a), which is titled "General Rule," was amended after the Act was originally introduced to include the "own, lease (or lease to), or operate" language. In discussing the purpose of amending the bill to include this language, the House Judiciary Committee observed, "This amendment also

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[13] App. at K-8, K-9.

clarifies what entities are covered under the **general rule of Title III**." H. Rep. No. 101-485 (III) at 24, *reprinted in* 1990 U.S.C.C.A.N. at 446 (emphasis added).[14] This statement shows that Congress intended the amendment to apply not just to the specific prohibitions contained in Section 302, but generally to all of Title III, including Section 303. Both Sections 302 and 303 are governed by the "General Rule." Both were intended to be governed by the amendment of that "General Rule" to identify liable parties as owners, operators, lessors, and lessees. Thus, there is no evidence that Congress intended that different parties would be liable under Section 303 than under Section 302. As discussed above, the legislative history demonstrates that Congress intended Sections 302 and 303 to be complimentary and that the same parties would be liable under either provision. As the Kentucky court observed in another of the cases brought by DOJ against DIA:

> The two sections at issue were initially drafted as part of a single statutory section. As an effort to narrow the definition of "public accommodation" and create a broader group of facilities subject to ADA compliance, Congress drafted §§ 302 and 303. Based on the similarities in the purpose and in the drafting of §§ 302 and 303, it is apparent to this Court that Congress intended to limit liability under § 303 to owners, operators, lessors, and lessees. Failing to use § 302 as a guidepost for liability would result in the consequence of an illogical limit to the reach of § 303. Using language such as "design and construct" to guide liability would leave subcontractors, material suppliers, and similar

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[14] App. at I-4.

entities faced with responsibilities which Congress never intended.

(App. at F-5.) (Footnote omitted.)

CONCLUSION

On the basis of the foregoing arguments and authorities, Days Inns of America, Inc., and HFS Incorporated respectfully request that their petition for writ of certiorari be granted.

Dated: November 4, 1998

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§ 12182. Prohibition of discrimination by public accommodations

(a) General rule. No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

(b) Construction. (1) General prohibition. (A) Activities. (i) Denial of participation. It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, or accommodations of an entity.

(ii) Participation in unequal benefit. It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, or accommodation that is not equal to that afforded to other individuals.

(iii) Separate benefit. It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a

good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(iv) Individual or class of individuals. For purposes of clauses (i) through (iii) of this subparagraph, the term "individual or class of individuals" refers to the clients or customers of the covered public accommodation that enters into the contractual, licensing or other arrangement.

(B) Integrated settings. Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) Opportunity to participate. Notwithstanding the existence of separate or different programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) Administrative methods. An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration-

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) Association. It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) Specific prohibitions. (A) Discrimination. For purposes of subsection (a), discrimination includes-

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, or accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in an undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles and rail passenger cars used by an establishment for transporting individuals (not including barriers that can only be removed through

the retrofitting of vehicles or rail passenger cars by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, or accommodations available through alternative methods if such methods are readily achievable.

§ 12183. New construction and alterations in public accommodations and commercial facilities

(a) Application of term. Except as provided in subsection (b), as applied to public accommodations and commercial facilities, discrimination for purposes of section 302(a) [42 USCS § 12182(a)] includes–

(1) a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act [enacted July 26, 1990] that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this title [42 USCS §§ 12181 et seq.]; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by

individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of cost and scope (as determined under criteria established by the Attorney General).

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 98-1243

United States of America,	*	
	*	
Plaintiff-Appellant,	*	Appeal from the United States
	*	District Court for the District
v.	*	of South Dakota.
	*	
Days Inns of America, Inc.,	*	
Hospitality Franchise	*	
Systems, Inc.,	*	
	*	
Defendants-Appellees.	*	

Submitted: June 8, 1998
Filed: August 6, 1998

Before FAGG, BRIGHT, and BEAM, Circuit Judges.

BRIGHT, Circuit Judge.

The United States government brought this action against Days Inns of America, Inc. and its former parent company,

Hospitality Franchise Systems, Inc. (collectively referred to as "DIA") alleging DIA violated the Americans with Disabilities Act ("ADA") by failing to design and construct facilities at the Days Inn hotel in Wall, South Dakota (hereinafter "Wall Days Inn"), in compliance with accessibility requirements of the ADA. The district court granted summary judgment in favor of DIA. The district court opined that DIA did not design or construct Wall Days Inn and did not serve as the owner, lessor or operator of the hotel.

On appeal, the government challenges the district court's conclusion regarding whether DIA failed to "design and construct" the Wall Days Inn within the meaning of section 303 of the ADA. In addition, the government asserts that DIA controls and directs the functioning of the Wall Days Inn in several crucial respects and thus constitutes an "operator" of the facility, as required by section 302(a) of the ADA. We conclude that even though DIA does not serve as an "operator" of the Wall Days Inn, DIA may still bear liability under section 303's "design and construct" provision. We remand for further proceedings on this issue.

I. BACKGROUND

In 1992, Richard and Karla Hauk ("the Hauks") entered into negotiations with Andy Anderson, a franchise representative for Days Inns of America, Inc., concerning the possibility of opening a Days Inn franchise. Anderson referred the Hauks to an architect, David Baumann, and a building contractor, Double H Enterprises, Inc. Both Baumann and Double H Enterprises had previously participated in the design and building of other Days Inn hotels. The Hauks ultimately retained the services of the recommended architect and building contractor for construction of the Wall Days Inn.

The Hauks entered into a licensing agreement with DIA (hereinafter "Licensing Agreement") on December 12, 1992. Part of the Licensing Agreement required the following from the Hauks relating to design and construction for the hotel: (1) "create a site plan and detailed architectural plans and specifications . . . which must be submitted to DIA"; (2) obtain written approval of the architectural plans from DIA before proceeding, (3) provide written notice to DIA prior to beginning construction; (4) obtain DIA approval of any modifications to the construction plans; and (5) allow DIA to inspect construction while in progress.

The Hauks did not comply with several of the above provisions. First, rather than a detailed set of final architectural plans, the Hauks sent to Mark Zelazny of DIA's design and construction department only four pages of preliminary plans. Second, the Hauks' architect completed the final plans without receiving written approval of the preliminary plans from Zelazny. Finally, the unapproved plans were modified during construction without the approval of DIA.

During the period relevant to this case, DIA had a Planning and Design Standards Manual (PDSM) providing system standards for newly-constructed hotels. The PDSM provided a variety of guidelines and requirements for designing and planning new Days Inn hotels, including a provision requiring the franchisee to ensure ADA compliance.

During the construction of the Wall Days Inn, Anderson twice visited the construction site on behalf of DIA. Representatives of DIA also called the Hauks on several occasions during construction.

II. DISCUSSION

A. Parties Liable Under Section 303 of the ADA

For the purpose of this appeal only, DIA does not dispute that the Wall Days Inn, as built, fails to meet the "readily accessible" standard of the ADA.[1] The government argues that DIA bears responsibility under section 303(a) of the ADA, which provides in part:

> Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of [section 302(a) of the ADA] includes--
>
> (1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; . . . .

42 U.S.C. § 12183(a) (emphasis added). Section 303, however, is silent with respect to who is liable under section 303 for a "failure to design and construct" a readily accessible facility. DIA directs the court's attention to section 302(a) of the ADA, which provides in part:

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[1] According to the government, the absence of an elevator remains the primary feature that makes the Wall Days Inn an inaccessible facility. The ADA provides that unless a facility is two stories or less, the facility must provide an elevator. See 28 C.F.R. pt. 36, App. A, § 4.1.3(5) (1997).

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a) (emphasis added).

DIA argues that it does not bear liability under section 303 because the reference to section 302(a) in section 303 not only establishes that a failure to design and construct a compliant facility is discrimination, but also clarifies the parties who may be liable. Specifically, DIA maintains that section 302(a) limits the parties liable under section 303 to "any person who owns, leases (or leases to), or operates" a noncompliant facility. See 42 U.S.C. § 12182(a). Moreover, DIA argues that because it does not own, lease, or operate the Wall Days Inn, it cannot be liable for an ADA violation. We reject DIA's argument.

Courts should interpret statutory language in a manner that gives effect to all terms so as to avoid rendering terms useless. See Moskal v. United States, 498 U.S. 103), 109-110 (1990). We conclude that DIA's proffered interpretation of section 303 would improperly create a gap in coverage that Congress did not intend. Specifically, Congress clearly intended that commercial facilities be subject to the accessibility standards for new construction. See H.R. Rep. No. 101-485(II), at 116 (2d Sess.)(1990) ("the use of the term 'commercial facilities' is designed to cover those structures that are not included within the specific definition of 'public accommodation.'"). However, DIA's reading of sections 302(a) and 303 would limit the parties liable under section 303 to owners, operators, lessors, or lessees of public accommodations. The practical application of DIA's interpretation would leave no entity liable for violations of the

new construction accessibility standards for buildings which are commercial facilities only. Accordingly, by rendering meaningless section 303's inclusion of commercial facilities, DIA's interpretation of section 303 would result in an inexplicable gap in coverage of buildings that Congress clearly intended to include.

DIA attempts to remedy the gap in coverage by asserting that courts should import the types of entities liable into section 303 from section 302(a), but the phrase "owns, leases (or leases to), or operates a place of public accommodation" should be interpreted as "owns, leases (or leases to), or operates commercial facilities." See 42 U. S.C. § 12182(a) (emphasis added). In our view, DIA's interpretation violates the maxim of statutory interpretation that courts should give effect to the plain language of the statute. Western Nat'l Mut. Ins. Co. v. Commissioner of Internal Revenue, 65 F.3d 90, 93 (8th Cir. 1995). Accordingly, we reject DIA's position and conclude that section 303's anti-discrimination requirements are not limited to owners, operators, lessors and lessees of newly-constructed facilities.

B. The Meaning of "Design and Construct" Under Section 303

Having determined that section 303 of the ADA does not apply only to owners, operators, lessors, and lessees of newly-constructed facilities, we must now turn to the question of whether DIA bears responsibility for the failure to "design and construct"[2] the Wall Days Inn in compliance with the ADA.

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[2] In the context of this case and DIA, we apply conjunctively the "design and construct" language of section 303. Therefore, in order for DIA to be liable under section 303, DIA must have been responsible for the design and construction of the hotel. See Paralyzed Veterans of Am. v. Ellerbe Becket Architects & Eng'rs, P.C., 945 F. Supp. 1, 2 (D.D.C. 1996).

Because the ADA does not specify a standard for interpreting section 303, we must determine what types of entities are liable for failing to "design and construct" an accessible facility. We note that the Department of Justice (DOJ) has issued a Technical Assistance Manual, which directs that architects and contractors may be liable for failing to design and construct accessible facilities. See The Americans with Disabilities Act, Department of Justice, Technical Assistance Manual § III-5.1000 (Jan. 1993). This DOJ directive supports the government's assertion that any party substantially participating in the design and construction of a facility shares the responsibility if the facility violates ADA's standards.

The Supreme Court has stated that courts should defer to a reasonable interpretation of a statute adopted by the administrative agency charged with its enforcement. Nationsbank of North Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-57 (1995) (citations omitted). Although we adhere to this well-settled rule, the DOJ's interpretation imports some limitation. Clearly, not any party tangentially or remotely connected with the design and construction of a facility sustains liability if the facility is ultimately constructed in violation of the ADA.

Recently, In United States v. Bestfoods, 118 S. Ct. 1876 (1998), the Supreme Court considered the issue of liability for a parent corporation under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Although relating to a different federal statute, the Supreme Court's opinion in Bestfoods provides this Court with helpful direction. In Bestfoods, the Supreme Court opined that in order for a parent corporation to be liable for a violation of CERCLA, the parent corporation "must manage, direct, or conduct operations specifically related to" the violation or compliance with CERCLA. Id. at 1887.

In the present case, to give effect to the plain language of section 303, as well as deference to the DOJ's interpretation of the statute, we conclude that to bear responsibility for an inaccessible facility under section 303, a party must possess a significant degree of control over the final design and construction of a facility.[3]

DIA possessed extensive authority to control the design and construction process. As stated, the Licensing Agreement required the Hauks to comply with DIA's design and construction standards (which included a requirement that the facility comply with ADA requirements) and permitted DIA to terminate the franchise if the Hauks failed to comply with those standards or with the requirements of the ADA. Moreover, DIA established an elaborate mechanism for enforcing its design and construction standards. Specifically, DIA required franchisees to submit architectural and design plans for review, to allow inspection of construction sites, to obtain a written certification from DIA that their hotels met the DIA's standards, and to permit DIA to inspect the hotels after they opened for business. Thus, the Licensing Agreement provided DIA with a significant amount of authority (power to terminate franchise) which would have enabled DIA to ensure ADA compliance.[4]

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[3] Therefore, a franchiser that does not possess the authority to control the design and construction of franchisee's facility would not risk liability under section 303. Moreover, a franchisor's mere instruction that the franchisee's facility comply with the ADA or some other law would not constitute significant control over the design and construction of the facility.

[4] The district Court discussed the amount of control DIA possessed in the context of determining whether DIA constituted an "operator" of the Wall Days Inn. We agree that DIA did not serve as an "operator" of the Wall Days Inn. Nevertheless, section 303's "design and construct" provision extends beyond persons or entities that may be operators.

The district Court determined that DIA exerted an insignificant amount of control over the design and construction of the Wall Days Inn.

Despite having significant authority to control the design and construction process, DIA apparently chose to exercise only a meager portion of its available influence. Although DIA reviewed and approved preliminary design plans, DIA never received or demanded the final plans for the Wall Days Inn. Moreover, the Hauks' architect made final the design plans before receiving DIA's response to the preliminary design plans. Thus, DIA's review of building plans did not play much, if any, factor in the design and construction of the Wall Days Inn. We must therefore determine whether a party, such as DIA, violates section 303 when the party possesses Sufficient authority over the design and construction process to ensure ADA compliance, but does not exert this authority.

A franchisor with no knowledge that a franchisee has constructed a facility in violation of the ADA should not stiffer liability under section 303, regardless of the franchisor's available authority to ensure ADA compliance. The government has not proffered any persuasive rationale for treating differently a franchisor that has no control over the design and construction of a franchisee's facility and a franchisor with significant control, but without any knowledge that the franchisee has built a facility in violation of franchise agreements, as well as the ADA.

In the present case, it remains unclear whether DIA had actual knowledge that the Wall Days Inn did not meet ADA requirements. Upon reviewing the preliminary plans sent to DIA, we cannot determine as a matter of law whether the preliminary plans disclosed the ADA violations. Furthermore, we cannot determine from the record whether the actual inspection by Anderson (DIA's representative) of the Wall Days Inn exposed the inaccessible features. Accordingly, we reverse the district court's grant of summary

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However, the district court improperly focused on the amount of control DIA actually exerted rather than the amount of control DIA had available and whether DIA had actual knowledge of the ADA violation.

judgment in favor of DIA and remand this case for the district court to determine whether DIA possessed actual knowledge that the final design and construction plans for the Wall Days Inn violated the ADA.

If DIA had such knowledge, it would be liable for the violations inasmuch as it retained ample power to require compliance with the ADA. Without such actual knowledge, however, it would not have "failed to design and construct" the proposed Wall Days Inn in compliance with the accessibility requirements of the ADA.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

UNITED STATES OF AMERICA,	)	CIV. 96-5012
	)	1997 DSD 30
Plaintiff,	)	
vs.	)	
	)	MEMORANDUM OPINION
DAYS INNS OF AMERICA, INC., HOSPITALITY FRANCHISE SYSTEMS, INC.,	)	AND ORDER
Defendants.	)	

NATURE AND PROCEDURAL HISTORY

[¶1] On February 8, 1996, the United States Department of Justice (DOJ) filed suit against defendants for violations of title III of the Americans with Disabilities Act of 1990 (ADA). The subject of the complaint is the Days Inn in Wall, South Dakota. Specifically, the complaint alleged that the hotel was in violation of 42 U.S.C. §§ 12181 through 12189 (Docket #1). DOJ is seeking injunctive relief and civil penalties.

[¶2] The defendants named in the complaint were: Days Inns of America, Inc. (DIA), the franchisor of the Wall Days Inn; Hospitality Franchise Systems, Inc. (HFS), the parent

company of DIA; Richard and Karla Hauk (Hauks), owners of the Wall Days Inn; David Baumann (Baumann), the architect of the Wall Days Inn; and Double H Enterprises, Inc. (Double H), the general contractor. The Court entered a consent judgment on June 5, 1997, in which the Hauks, Baumann, and Double H were dismissed from the suit, leaving only DIA and HFS.[1] (Docket #50).

[¶3] Pending before the Court are cross motions for summary judgment filed by both DOJ (Docket #63) and DIA (Docket #59).

[¶4] This Court has jurisdiction under 42 U.S.C. § 12188(b)(1)(B). Remedial authority is set forth at 42 U.S.C. § 12188(b)(2).

FACTS

[¶5] In 1992 Richard Hauk (Hauk) purchased real estate in Wall, South Dakota, from his father. R. Hauk Depo. at 12. Later that year Hauk was approached by Andy Anderson (Anderson), a DIA franchise representative, about the prospects for the piece of vacant property. (DOJ's Facts ¶¶ 44, 45). Hauks entered into conversations with Anderson about the possibility of pursuing a Days Inn franchise. Anderson referred Hauks to David Baumann (Baumann), an architect with whom Anderson was familiar and who he knew had designed other Days Inns. Id. at ¶¶ 46, 47. Anderson also referred Hauks to Double H, a contractor who had built several Days Inns previously. Id. at ¶ 54-55. Consequently, Hauks retained the services of both Baumann and Double H for the design and construction of the Wall Days Inn.

[¶6] Hauks entered into a licensing agreement with DIA on December 12, 1992 (Wall License Agreement). Part of the

[1] HFS is the parent company of DIA. It will be collectively referred to as DIA unless the context requires otherwise.

licensing agreement required the following from Hauks relating to design and construction of the hotel: (1) "create a site plan and detailed architectural plans and specifications .... which must be submitted to DIA"; (2) get written approval of said plans from DIA before proceeding; (3) provide written notice to DIA prior to beginning construction; (4) obtain DIA approval of any modifications to the construction plans; and (5) allow DIA to inspect construction while in progress. Wall License Agreement ¶ 4. The licensing agreement also addressed Hauks' utilization of the DIA "System," a comprehensive procedure for the marketing and maintenance of the franchise. Id. at 16. The licensing agreement contained provisions for the following as well: proprietary rights ¶ 10; system standards ¶ 11; reservation system ¶ 12; marketing ¶ 13; training and consulting services ¶ 14; and additional licensee duties ¶ 16.

[¶7] Hauks did not comply with several of the above provisions. First, the plans for the Wall project submitted to DIA consisted of four pages of preliminary plans which were sent to Mark Zelazny (Zelazny) of DIA's Design and Construction Department. DOJ's Facts ¶ 72. Second, Baumann, the architect, completed the final plans prior to receiving the preliminary plans back from Zelazny. Baumann Depo. at 154-56. Third, the DIA-approved plans were not incorporated into final construction. Hayes Depo. at 118-19, 23. Finally, the unapproved plans were modified during construction without the approval of DIA. Hayes Depo. at 133-41; R. Hauk Depo. at 255-57.

[¶8] During the period of time relevant to this case, DIA had in existence a Planning and Design Standards Manual (PDSM) and an Operating Policies Manual (OPM) providing system standards for newly constructed hotels. (DIA's Facts ¶ 6). During design of the Wall project, Baumann relied upon the PDSM for guidance as to DIA minimum requirements. Baumann Depo. at 79, 100.

[¶9] The purpose of the PDSM "is to establish the minimum standards required by Days Inns of America, Inc." PDSM at 2. It provided for a variety of guidelines and requirements for designing and planning new Days Inn hotels. Included in the PDSM was a provision noting that it was the responsibility of the licensee to make sure the design of the facility complies with various regulations and codes including the ADA. PDSM section 1.03-A-B. Baumann was aware that the PDSM represented minimum standards, and that, the accessibility standards of the ADA needed to be met in addition to the guidelines in the PDSM. Baumann Depo. 193-199. It is undisputed that the completed project did not comply with the guidelines in the PDSM or the ADA.

[¶10] During construction of the Wall Days Inn, Anderson visited the site on two occasions. DOJ's Facts ¶ 75. DIA also called Hauks on several occasions while the hotel was being built. Id. at ¶ 76. DIA's presence and influence in the operation of hotels run by Days Inn franchisees continued in varying degrees after construction of the hotel. Shortly after completion of the Inn, a DIA official visited Wall to install the reservation system and conduct management training. Merriman Depo. at 54-59. The OPM sets minimum standards for reservations, quality assurance, training, operations, marketing, and various other areas.[2] OPM at 1-2. The franchise agreement requires the OPM to be followed.

[¶11] Compliance with the above standards is monitored through three quality assurance inspections a year. OPM at 46. The inspector grades the facility, with a maximum score of 500 points. OPM at 6. A score of less than 400 constitutes

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[2] The types of areas for which detailed standards exist in the OPM include: "cleanliness, maintenance, supplies, concession types, Food and Beverage service, vending machines, uniforms, staffing, employee training, replacement of F/F/E [furniture, fixtures, and equipment], decor and other capital items, guest relations guest comfort, and other areas." OPM at 103.

a failing grade and the licensee is given up to thirty days to comply with the OPM. Id. Upon inspection, if the facility fails again DIA may suspend the hotel from the Reservation System and "terminate the Days Inns Agreement or take other appropriate action." Id.

SUMMARY JUDGMENT STANDARD

[¶12] Under Rule 56(c) of the Federal Rules of Civil Procedure, a movant is entitled to summary judgment if the movant can "show that there is no genuine issue as to any material fact and that [the movant] is entitled to judgment as a matter of law." In determining whether summary judgment should issue, the facts and inferences from those facts are viewed in the light most favorable to the nonmoving party, and the burden is placed on the moving party to establish both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 1356-57, 89 L. Ed. 2d 538 (1986). Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists.

[¶13] In determining whether a genuine issue of material fact exists, the Court views the evidence presented based upon which party has the burden of proof under the underlying substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2513, 91 L. Ed. 2d 202 (1986). The Supreme Court has instructed that "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy, and inexpensive determination of every action.'" Celotex Corp. v.

Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555, 91 L. Ed. 2d 265 (1986). The nonmoving party "must do more than show that there is some metaphysical doubt as to the material facts," and "[w]here the record as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" Matsushita, 106 S. Ct. at 1356.

[¶14] The trilogy of Celotex, Anderson, and Matsushita provides the Court with a methodology in analyzing motions for summary judgment. See generally 1 Steven A. Childress & Martha S. Davis, Federal Standards of Review § 5.04 (2d ed. 1991) (discussing the standards for granting summary judgment that have emerged from Matsushita, Celotex, and Anderson).[3]

DISCUSSION

[¶15] The Statutes

[¶16] Two sections of title III of the ADA, § 302 and § 303, are applicable. The statutes are as follows:

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[3] The trilogy of Celotex, Anderson, and Matsushita has redefined the standard for summary judgment previously annunciated in Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 90 S. Ct. 1598, 1608, 26 L. Ed. 2d 142 (1970) and Poller v. Columbia Broadcasting Sys., Inc., 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458, 488 (1962). Poller and Adickes run counter to the teachings of Celotex, Anderson, and Matsushita which take issue with the concept that summary judgment is to be used sparingly. See generally William W. Schwarzer, Alan Hirsch, and David J. Barrans, The Analysis and Decision of Summary Judgment Motions: A Monograph on Rule 56 of the Federal Rules of Civil Procedure, Federal Judicial Center, at 4 (1991).

Section 302 of the ADA reads, in part, as follows:

> **§ 12182. Prohibition of discrimination by public accommodations**
>
> **(a) General rule**
>
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person **who owns, leases (or leases to), or operates** a place of public accommodation.

42 U.S.C. § 12182 (1995) (emphasis supplied).

[¶17] Section 303 of the ADA reads, in part, as follows:

> **§ 12183. New construction and alterations in public accommodation and commercial facilities**
>
> **(a) Application of term**
>
> Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) [§ 302 of the ADA] of this title includes –
>
> > **(1)** a failure to **design and construct** facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or

> incorporated by reference in regulations issued under this subchapter; ...

42 U.S.C. § 12183 (1995) (emphasis supplied).

[¶18] The Parties' Positions

[¶19] DOJ would have the Court interpret § 303 to hold DIA liable as a party which "designed and constructed" the Wall Days Inn. DOJ's alternate position is that even if § 303 does not hold DIA liable as a designer and constructor, DIA would still be liable since DIA is within the definition of an operator under § 302. DOJ's Brief at 25-34.[4] DIA counters that it should not be considered an operator under § 302. As to DOJ's alternate position, DIA states it did not design and construct the Wall Days Inn. The Court agrees. DIA does not come within the umbrella of either § 302 or § 303. Summary judgment will be entered in favor of DIA and HFS.

[¶20] Existing Case Law

[¶21] In Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, 945 F. Supp. 1 (D.D.C. 1996), an ADA claim was brought against an architectural and engineering firm and its parent company arising out of the design of a sports and multipurpose arena. The defendants exercised a design function only. They did not exercise the construction function. Upon a motion to dismiss filed by the defendants, the district court held that the words "design and construct" found in 42 U.S.C. § 12183(a)(1) (§ 303) were distinctly conjunctive. Therefore, since the defendants only designed but did not construct the facility, § 303 did not include them.

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[4] Both sides agree that § 303 incorporates the language from § 302, which holds liable owners, operators, and lessors of non-ADA complying public accommodations and commercial facilities. DOJ's Brief at 25; DIA's Brief at 7.

[¶22] The district court further held that 42 U.S.C. § 12182 (§ 302) limiting the statute to "owners, operators, and lessors" also applies to § 303, thereby excluding architects from liability. Inferentially, even had the defendants both designed and constructed the facility, they would not have been included under § 303. This latter holding, of course, was dicta and affords no authority to this Court.

[¶23] A second district court case is Johanson v. Huizenga Holdings, Inc., 963 F. Supp. 1175 (S.D. Fla. 1997). This case was also decided in the posture of a motion to dismiss. The action was brought by ADA claimants against, among others, the architect, Ellerbe Beckett, and its parent corporation, who were involved in the construction of a hockey arena. Defendant Ellerbe Beckett, Architects and Engineers, Inc., filed a motion to dismiss claiming that architects were not liable under either § 302 or § 303 of the ADA.

[¶24] Ellerbe Beckett, relying on Paralyzed Veterans, claimed that since it designed but did not construct the facility, it would not be liable under § 303. Ellerbe Beckett's fallback position was that since § 303 incorporates § 302 by reference, § 302's reference to those who "own, lease, or operate" applies to those who "design and construct." Therefore, since it did not "own, lease, or operate" the facility, it was not liable. The district court denied Ellerbe Beckett's motion to dismiss stating, "If architects are not liable under the ADA, then it is conceivable that no entity would be liable for construction of a new commercial facility which violates the ADA."

[¶25] A Minnesota district court recently was faced with the interpretation of § 303(a). United States v. Ellerbe Beckett, Inc., 1997 WL 610275 (D. Minn. 1997). The complaint alleged that Ellerbe Beckett had engaged in a pattern of practice of designing new sports arenas and stadiums across the United States that failed to comply with the ADA. Ellerbe Beckett filed a motion to dismiss under Fed. R. Civ. P.

12(b)(6) arguing that architects are excluded as a matter of law from liability under the ADA. Ellerbe Beckett made essentially the same argument made to the Florida court in Johanson, namely: (1) the plain language of the ADA excludes architects; and (2) only entities which design and construct facilities maybe liable under § 302(a). The government's argument was also essentially the same as the one made to the Florida district court, namely: (1) the inclusion of the word "design" in the ADA indicates congressional intention to subject the designer of buildings to the ADA; (2) otherwise there would remain an "inexplicable gap" in coverage of the statute; and (3) due deference should be afforded the Department of Justice's interpretation of the ADA.

[¶26] The Minnesota court denied the motion to dismiss, recognizing implicitly that the questions to be resolved involved fact issues as to whether the defendant Ellerbe Beckett participated in the construction as well as the design of the arenas at issue. In the posture of a Rule 12(b)(6) motion, the court was not permitted to go beyond the allegations of a well-pleaded complaint. See, e.g., Neitzke v. Williams, 490 U.S. 319,109 S. Ct. 1827,104 L. Ed. 2d 338 (1980); Palmer v. Tracor, Inc., 856 F.2d 1131 (8th Cir. 1988) (standard of dismissal under Fed. R. Civ. P. 12(b)(6)). The Minnesota court, applying the Rule 12(b)(6) rule, denied the motion to dismiss.

[¶27] The posture of this case is different. This case comes to the Court on cross motions for summary judgment under Federal Rule of Civil Procedure 56, facts not being in dispute. This Court is able to decide the substance of DOJ's motion. This Court need not redetermine the issues addressed by the Florida and Minnesota district courts. Under the undisputed facts of this case, as a matter of law DIA did not design and construct the Wall Days Inn, nor was it an owner, lessor, or operator under § 302.

[¶28] The district courts in both Johanson and Ellerbe Becket found only the principal architect liable under § 303. Therefore, DOJ is in a position in which it asks this Court to find, as a matter of law, that DIA's involvement in the design and construction of the Wall Days Inn was significant enough to establish DIA as the designer under § 303. To that end, a discussion of the facts which DOJ alleges supports such a finding is necessary.

[¶29] DOJ offers a litany of facts which it contends indicates the control that DIA had over the design and construction of the Wall Days Inn. DOJ's Brief at 7-12. A close review of all the material filed to date demonstrates that while DIA did provide some assistance and guidance to the design and construction process, DIA was not the designer or contractor responsible for the project. The influence DIA exerted through its licensing agreement and standards manuals simply does not rise to the level of control necessary to be considered the designer of the project for § 303 purposes.

[¶30] DOJ first contends that the standard licensing agreement used by DIA throughout the country contained numerous indicia, of control over the design and construction of the Wall project. DOJ's Brief at 10-11; DOJ's Facts at 5-8. The more relevant inquiry in this instance is not how DIA operated in a general sense but rather what happened with regard to the Wall Days Inn. To that end, DOJ's reliance on the standard licensing agreement is misplaced.

[¶31] DOJ next contends that the actual license agreement between DIA and Hauks also demonstrated a significant degree of control over the design and construction of the Wall facility. DOJ's Brief at 7; DOJ's Facts at 8-9. Certainly, the license agreement indicates that DIA, at some level, had input into the design and construction of the Wall Days Inn. This is to be expected for a franchisor to maintain minimum standards over its trademark. See Selinger, J. and Walker, A., How Real is the Risk of Failing to Police Trademarks?

Franchise Update 34 (3rd Quarter 1997). At any rate, the record indicates that the input was marginal and in many cases not followed by Baumann and Double H.

[¶32] Although the license agreement called for DIA approval of the architectural plans, such approval was not given. Baumann, who was the architect, did submit four pages of preliminary plans to the DIA Design and Construction Department. DOJ's Facts ¶ 72. These preliminary plans were examined by Zelazny, an architect working for DIA, and returned to Baumann with comments. DOJ's Facts ¶ 73. However, these preliminary plans and the comments by Zelazny were not incorporated into the final plans. Baumann Depo. at 154-56. In fact, the final plans for the Wall Days Inn were completed weeks before return of the marked-up preliminary plans and were never seen by Hayes, the contractor. Hayes Depo. at 118-20. Moreover, the license agreement clearly indicated that review of the architectural plans is for "initial compliance .... with System Standards, and not to detect errors or omissions in the work of the Licensees' architects, engineers, contractors or the like." Wall License Agreement ¶ 4.

[¶33] DOJ also contends that Baumann's reliance on the Days Inns of America, Inc. Planning & Design Standards Manual (PDSM) demonstrated DIA's influence on the final product. DOJ's Brief at 9. Yet the PDSM does not purport to be the definitive guideline for architectural plans and it clearly indicates that plans and construction are to comply with state and federal regulations, including an express reference to compliance with the ADA. PDSM section 1.03AB. Moreover, the standards set forth in the PDSM are "minimum acceptable requirements" and "are not comprehensive and must be supplemented by the Architect and the Licensee to complete the design specifications for the Days Inn System Unit." PDSM sections 1.02A and 1.01A.

[¶34] Perhaps most illustrative of the limited impact the PDSM had on the eventual design and construction is the fact that Baumann failed to comply with many of its mandates. Baumann Depo. at 146-48; 197-78. Aside from the lack of compliance with the ADA as called for in the PDSM, other major requirements were not followed such as the lack of an elevator for a building over two stories. PDSM section 8.12A. These facts indicate that Baumann was not bound by the PDSM or even that he depended upon it in formulating his final plans. He exercised his discretion as chief architect in incorporating certain aspects of the PDSM into the facility, while ignoring others.

[¶35] Another indication of control, according to DOJ, is the extent to which DIA monitored the progress of construction. DOJ's Brief at 10. Specifically, DIA points to the number of visits to the site by Anderson, the DIA franchise salesman, phone calls made to Hauk by DIA Property Openings Department, and inspections of the site after completion. Id. DOJ neglects to indicate how these visits and contacts actually influenced the design or construction of the project. Such a passive presence hardly demonstrates control of the project.

[¶36] Finally, DOJ attempts to ascribe enhanced significance to Anderson's role as a franchise representative. DOJ's Brief at 7-9. Anderson worked with Hauks and recommended an architect and contractor, both of whom had experience designing and building other Days Inn hotels. DOJ's Brief at 8. However, Hauks exercised the final right to choose whomever they desired to design and construct their hotel. Anderson's advice did not demonstrate DIA's control over the ultimate choice of who the Hauks chose. The leap of logic required to equate Anderson's suggestions with DIA control over the design and construction is one this Court refuses to make.

[¶37] In sum, while a designer of a public accommodation or commercial facility is by definition liable under § 303 of the ADA, the Court refuses DOJ's invitation to broaden the scope of this interpretation to include all parties who may have been "involved in" or who "participate in" the design and construction process, such as DIA.

[¶38] DIA as "Operator"

[¶39] Both parties in this dispute agree that, at a minimum, the "owns, leases (or leases to), operates" language of § 302 is incorporated by reference into § 303. DOJ's Brief at 25; DIA's Brief at 7. They disagree as to whether DIA "operated" the Wall Days Inn. DOJ argues that the degree of control exerted by DIA over the day-to-day operations establishes that DIA is an operator as that term has been defined. DOJ's Brief at 25-34. DIA argues the opposite, that the controls in place merely protect its trademark and that Hauks, as licensees, are the true "operators" of the Wall facility. DIA's Brief at 27-34.

[¶40] Nowhere in the ADA is "operate" defined. The Fifth Circuit, faced with a similar factual scenario, addressed the definition of "operate" in the context of § 302 and focused on the degree of control involved. Neff v. American Dairy Queen Corp., 58 F.3d 1063, 1067 (5th Cir. 1995), cert denied, __U.S.__, 116 S. Ct 704, 133 L. Ed. 2d 660 (1996). In Neff, a disabled individual brought suit against Dairy Queen, as franchisor, for violations of the ADA by two San Antonio franchises. Id. at 1064. In that case the court was faced with interpreting § 302 as it related to previously constructed facilities with inaccessible conditions, not as it pertained to new construction and § 303. Id. The court determined that the term "operate," in the § 302 context, meant the degree of control exerted. Id. at 1066. Specifically, the court held that Dairy Queen, as the franchisor, did not exert control over the physical modification of the stores and thus was not the operator. Id. at 1065; see also Young v. American Dairy Queen Corp., 1994 WL 761233, *2 (N.D. Tex. 1994); Neff v.

American Dairy Queen, Inc., 879 F. Supp. 57,60 (W.D. Tex. 1994).

[¶41] According to the interpretation of "operate" in Neff, determining liability under § 303 hinges on whether DIA exerted control over the design and construction of the Wall Days Inn. The court in Neff referred to the situation in this case and how "operate" may be applied differently to a new construction, § 303 context. Id. at 1068 ("even if ADQ 'operated' the store with respect to its construction, such operation is irrelevant because the issue in Neffs case iswhether ADQ 'operates' the San Antonio Stores with respect to the removal of existing architectural barriers.") Drawing upon the reasoning articulated in Neff, the relevant inquiry in the instant case is whether DIA was the operator of the design and construction of the Wall Days Inn. To that end, the relevance of DIA's control following completion of the Wall facility is limited.

[¶42] The Eighth Circuit, interpreting the term "operate" in a different setting indicated that "the verb 'to operate' means 'to perform a work or labor,' to 'exert power or influence,' to produce an effect,' 'to cause to occur' or 'to bring about by or as if by the exertion of positive effort or influence.'" United States v. Gurley, 43 F.3d 1188, 1193 (1994) (citing Webster's Third New Int'l Dictionary at 1580-81 (1986) to interpret "operate" as used in CERCLA). The Eighth Circuit's interpretation, coupled with the canon of statutory construction that words be given their "ordinary, contemporary, common meaning," Perrin v. United States, 444 U.S. 37, 42, 100 S. Ct. 311, 314, 62 L. Ed. 2d 199 (1979), leads this Court to believe that determining if DIA was an "operator" for the sake of the design and construction of the Wall Days Inn means discerning how much influence DIA exerted over its design and construction. Simply as a franchisor and under the undisputed facts of this case, the Court is unable to hold that DIA was an "operator" as

contemplated by § 303 of the ADA. The Court has been unable to find an Eighth Circuit case interpreting § 302 and § 303.[5] Nonetheless, this Court believes that if presented with the issues of this case, the Eighth Circuit Court of Appeals would find the Fifth Circuit case of Neff as authority for this Court's granting of summary judgment in favor of DIA.

CONCLUSION

[¶43] The Court concludes that DIA did not either own, lease (or lease to), or operate the Days Inn of Wall. Further, DIA did not design and construct the Inn. It therefore did not violate § 302 or § 303 of the ADA.

[¶44] Accordingly, it is hereby

[¶45] ORDERED that DOJ's motion for summary judgment (Docket #63) is denied.

[¶46] IT IS FURTHER ORDERED that DIA's motion for summary judgment (Docket #59) is granted. Judgment shall be entered in favor of the DIA, together with costs.

Dated this 29th day of October, 1997.

BY THE COURT:

/s/
RICHARD H. BATTEY
CHIEF JUDGE

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[5] See Kathleen Pearson, Let's All Go To The Dairy Queen Without Margo!: The Liability of Franchisors under Title III of the Americans with Disabilities Act After Neff v. American Dairy Queen Corp., 101 Dick. L. Rev. 137 (1996).

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

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UNITED STATES OF AMERICA,

Plaintiff,

v.

DAYS INNS OF AMERICA, INC., HFS INC., DILIP PATEL, IYER & ASSOCIATES, and R.E. HUFFMAN CORP.,

Defendants.

NO. CIV. S-96-260 WBS\GGH

MEMORANDUM AND ORDER

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Both sides move for summary judgment in this action brought by the United States against defendants, Days Inns of America and its parent company HFS Inc. (collectively "Days Inns"), under Title III of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12183(a).

Days Inns, as franchisor, licenses over 1,700 facilities, among which is the Days Inn of Willows, California. The government seeks to establish liability of Days Inns for certain alleged violations in the design and construction of that facility under Section 303 of the ADA, 42 U.S.C. § 12183, which provides as follows:

". . . [A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes -

(1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter; and

(2) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs. Where the entity is undertaking an alteration that affects or could affect usability of or access to an area of the facility containing a primary function, the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the altered area, are readily accessible to and usable by individuals with disabilities where such alterations to the path of travel or the bathrooms, telephones, and drinking fountains serving the altered area are not disproportionate to the overall alterations in terms of

costs and scope (as determined under criteria established by the Attorney General).

The government argues that any party who engages in, or is involved in, the design and construction of an inaccessible facility violates section 303 of the ADA. Therefore, according to the government's construction of the statute plumbers would be responsible for plumbing violations within the scope of their authority, architects for design violations, and so forth.[1] Indeed, the government goes so far as to argue that an individual carpenter who frames a door too narrowly to comply with ADA standards is personally liable under § 303. The court cannot accept the government's interpretation.

1. Liability under § 303

The Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq., takes a two-stage approach to eventually eradicating the barriers that make facilities inaccessible to the disabled. Section 302 of the ADA, 42 U.S.C. § 12182, imposes on existing facilities certain accessibility requirements which are "readily achievable." Whereas section 303, 42 U.S.C. § 12183, requires that new construction or significant alterations meet stricter accessibility requirements – "readily accessible." The distinction between existing and new facilities reflects the fact that it is far easier and less expensive to design and construct accessible structures from the outset than it is to retrofit old

[1] As the examples indicate, the government actually argues that § 303 makes it illegal to design or construct a non-accessible structure. This interpretation is inconsistent with the conjunctive "design and construct" language of the statute. Paralyzed Veterans of America v. Ellerbe Becket Architects & Engineers, P.C., 945 F. Supp. 1, 2 (D.D.C. 1996) (holding that to be liable a party must both design and construct a facility).

ones.[2] Because of this economic fact, § 303 has broader applicability than § 302. The former applies not only to "public accommodations,"[3] but to "commercial facilities" as well.[3] Costly changes need not be made to commercial facilities until they are modified, but then, like public accommodations, they must comply with the more demanding "readily accessible" ADA guidelines. Thus, § 303 was intended to insure that virtually all new construction complies with ADA mandates, increasingly moving toward the goal of making all facilities accessible to the disabled.[4]

Standing alone, section 303 contains no language of prohibition; it simply defines what constitutes discrimination as applied to public accommodation and commercial facilitation. it does not say who may be held liable for such discrimination. Instead, § 303 makes specific reference to section 302(a) of the ADA, 42 U.S.C. § 12182(a) for the prohibiting provisions.

Section 302(a) sets forth the "'General Rule" for ADA Title III liability:

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[2] "Because retrofitting existing structures to make them fully accessible is costly, a far lower standard of accessibility has been adopted for existing structures - a standard of 'readily achievable.' Because it costs far less to incorporate accessible design into the planning and construction of new buildings and of alterations, a higher standard of 'readily accessible to and usable by' persons with disabilities has been adopted in the ADA for new construction and alterations." H. Rep. No. 101-485(III), at 60 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 483.

[3] Hotels are "public accommodations." 42 U.S.C. 12107(7)(A). "Commercial facilities" is a broader term than "public accommodations." See 42 U.S.C. §§ 12181 (2) & (7).

[4] "The ADA is geared to the future - the goal being that, over time, access will be the rule rather than the exception. Thus, the bill only requires modest expenditures to provide access in existing facilities, while requiring all new construction to be accessible." H. Rep. No. 101-485(III), at 62 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 486.

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. § 12182(a). The issue is whether the language of § 302(a) that imposes liability on "any person who owns, leases (or leases to), or operates" is incorporated into § 303(a), which applies to new construction in both public accommodations and commercial facilities.

The reading most consistent with Congressional intent and the text and design of Title III is that § 302(a) describes the parties liable for both § 302 and § 303. Section 303(a) applies to new construction and sets forth a "readily accessible" standard. That higher standard is - by explicit statutory reference - governed by the "General Rule" of § 302(a). Accordingly, by its incorporation of § 302(a), § 303(a) is intended to apply to "any person who owns, leases (or leases to), or operates" a public accommodation or commercial facility. Indeed, this incorporation is necessary, for without the reference to § 302(a), § 303(a) does not prohibit anybody from doing anything. Section 303(a) depends on § 302(a) for the prohibitory language. Therefore, § 303(a) must incorporate the language of § 302(a).[5]

The distinction between sections 302(a) and 303(a) reflects the cost difference of new construction as opposed to retrofitting. The statute, however, does not differentiate

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[5] Accordingly, the court need not reach the factual issue of whether Days Inns designed and constructed the Willows Days Inn. But see United States v. Days Inns of America, No. 96-5012 (D.S.D. Oct. 29, 1997) (not addressing statutory question, reaching issue, and holding that Days Inns did not design and construct the hotel at issue there).

between the parties held to those higher standards.[6] In fact, by § 303(a)'s terms it adopts the coverage of § 302(a). All new construction, both in public accommodations and in commercial facilities, must comply with the most rigorous accessibility standards in the ADA, but the liability provisions remain the same.

The government's interpretation, on the other hand, cannot withstand scrutiny. Section 303(a) expressly applies to both public accommodations and commercial facilities and explicitly refers to § 302(a). The government suggests that there is an inexplicable liability gap for commercial facilities. However, section 303(a) precedes the reference to § 302(a) by stating "as applied to public accommodations and commercial facilities." That phrasing, coupled with the structure of the statute and Congress' clear intent to cover both public accommodations and commercial facilities, demonstrates that § 303(a) incorporates the provisions of § 302(a) without the coverage gap the government attempts to read into Title III.[7] Reading the "as applied to public accommodations and commercial facilities" language before proceeding to § 302(a) eliminates the suggested gap in coverage.

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[6] Nothing in the legislative history indicates otherwise. In fact, what can be discerned from such sources supports the court's interpretation. Sections 302 and 303 were initially part of the same section (§ 402(a)) and were separated to clarify that new construction standards would apply to both public accommodations and commercial facilities. See S. 933, 101st Cong. 1st Sess. (1989). The two sections were intended to operate as one, so the liability provisions apply to both.

[7] The government's argument that the ADA should be liberally construed to effectuate its remedial purpose is unpersuasive. Courts resort to canons of construction only when the statute is unclear; even then a liberal reading is not a rewriting. Cf. EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995) ("A liberal construction does not mean one that flies in the face of the structure of the statute.").

The court will not adopt the government's interpretation that § 303(a) refers to § 302(a) in order to confirm that the "discrimination" referenced to is discrimination based on disability, particularly when a more sensible interpretation exists.[8]

Indeed, if Congress meant to impose liability on entities which influence a discriminatory activity, it could have used the language of Title II of the ADA. 42 U.S.C. § 12162(e)(1), makes it unlawful for a public entity to construct new inaccessible rail stations. "Station," as defined in § 241, includes property appurtenant to a right-of-way "to the extent that such public entity exercises control over the selection, design, construction, or alteration of the property." 42 U.S.C. § 12161(6). Congress thus knew how to impose precisely the liability the government attempts to read into § 303. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Rodriguez v. United States, 480 U.S. 522, 525 (1987) (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

The government also argues that greater compliance and less litigation would result if the class of liable persons included those such as architects, engineers, and contractors. Broader liability would mean fewer inaccessible structures. However, the government's position is hardly more practical: as indicated, in the government's view an individual carpenter risks personal ADA liability if he or she frames a door too

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[8] Deference to the interpretation of the Department of Justice is unwarranted here. Congressional intent on the question of liability for violations of the new construction requirements in public accommodations is clear. See Chevron USA, Inc. v. NRDC, 467 U.S. 837 (1984). Because the court, "using the traditional tools of statutory construction" finds a clear Congressional intent, it need not proceed to the second step of the Chevron analysis. See Almero v. INS, 18 F.3d 757, 763 (9th Cir. 1994).

narrowly. On the other hand, the court's holding clearly identifies the parties liable - those enumerated in § 302(a) - and they are those in the best position to insure accessibility. only one lawsuit is required to compel compliance and the potentially liable parties risk the enormous expense of retrofitting illegal new construction to achieve compliance if they fail to follow ADA regulations.

For the foregoing reasons, Days Inns cannot be a liable under § 303 unless it can be shown that Days Inns "owns, leases (or leases to), or operates" an individual Days Inn.

2. Operator Liability

The term "operates" is not defined in the ADA. Undefined terms are construed according to their ordinary or natural meaning. Smith v. United States, 508 U.S. 223, 228 (1993). In the context of business operations, to "operate" is variously defined as "[t]o conduct the affairs of; manage," The American Heritage Dictionary 1268 (3d ed. 1992); "to manage and put or keep in operation," Webster's Third New International Dictionary 1581 (1986). The franchisee secures financing, hires and fires workers, purchases insurance, and generally manages the day-to-day operations of the business. Common usage therefore indicates that a franchisee "operates" a franchise under license from a franchisor.

Days Inn's Planning and Design Standards Manual ("PSDM") is a "guideline" that sets forth the "minimum acceptable requirements" for a Days Inn Facility. PDSM specifically contemplate the obligations of the parties. Design and construction of a Days Inn hotel must comply with Days Inns requirements and applicable federal and local codes, including the ADA; and Days Inns standards must give way to applicable codes and regulations. The Days Inns evaluations and inspections are only to check for compliance with System

Standards, not building codes such as the ADA. According to the license agreement: "Licensee acknowledges that all inspections under this paragraph (as well as any review and approval of Licensee's Approved Building Plans and/or the Unit) are solely for the purposes of ascertaining compliance with System Standards." It is explicitly the obligation of the franchisee to comply with these codes. Indeed, in the license agreement, the licensee, H.K. & Family, "expressly represents and warrants to Days Inns . . . [That the] Unit will be built and operated in compliance with all local, state and federal laws, ordinances, rules and regulations." Neither a conventional reading of the term "operates" nor the contractual relationship between Days Inns and its franchisee are sufficient to establish liability for Days Inns.

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The only appellate decision to consider a similar issue is in accord. Neff v. American Dairy Queen Corp., 58 F.3d 1063 (5th Cir. 1995), cert. denied, 116 S.Ct. 704 (1996). In Neff, the Fifth Circuit considered whether a franchisor, American Dairy Queen Corporation, was responsible for a franchisee's failure to make an existing store accessible to the disabled. The Neff court held that the franchisor is not liable for the acts of its franchisees unless the contractual relationship between the two indicates that the franchisor controls the activity in question. Id. at 1067. The court finds the Neff court's reasoning persuasive. The holding that to "operate" a facility for ADA purposes, one must have authority for the discriminatory action is consistent with other cases interpreting that section. See Howe v. Hull, 873 F. Supp. 72, 77 (N.D. Ohio 1994) (focusing on authority to perform discriminatory acts for ADA operator liability); Aikins v. St. Helena Hosp., 843 F. Supp. 1329, 1335 (N.D. Cal. 1994) (ADA liability requires control over discriminatory acts).

Therefore, even if Days Inn were found to "control" individual hotels' day-to-day activities, Neff and other courts that have considered the issue appropriately deem the relevant inquiry to be the control over the discriminatory conditions. Neff, 58 F.3d at 1067. At most Days Inns has the same negative veto influence the Neff court found inadequate to establish vicarious franchisor liability. Id. at 1068. Here Days Inns simply does not exercise the type of control that would trigger ADA liability.[9] Cf. Cortez v. National Basketball Ass'n, 960 F. Supp. 113, 115 (W.D. Tex. 1997) (NBA does not "operate," for ADA Title III purposes, individual team arenas despite existence of NBA Facility Standards guidelines).

IT IS THEREFORE ORDERED that plaintiff's motion for summary judgment, be and the same is, hereby DENIED; and that defendants' motion for summary judgment be, and the same hereby is, GRANTED. In light of this decision, it is unnecessary for the court to rule upon defendants' motion to amend their answer.

DATED: January 9, 1998

/s/
WILLIAM B. SHUBB
UNITED STATES DISTRICT JUDGE

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[9] Courts have come to similar conclusions about vicarious franchisor liability under other civil rights statutes as well. See, e.g., Evans v. McDonalds Corp., 936 F.2d 1087 (10th Cir. 1991) (franchisor not "employer" for purposes of Title VII).

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS
URBANA DIVISION

UNITED STATES OF AMERICA,	)	
	)	
-Plaintiff,	)	
	)	
v.	)	Case No.: 96-2028
	)	
DAYS INNS OF AMERICA, INC., et al.,	)	
	)	
-Defendants.	)	

ORDER

The United States brought this action alleging violations of the Americans With Disabilities Act (ADA) in the construction of the Champaign, Illinois, Days Inn hotel. The case is before the court on cross motions for summary judgment. The court now holds as a matter of law that the defendants Days Inns of America, Inc. and its parent company, HFS, Inc., are liable for any violations of the ADA in the construction of the Champaign Days Inn hotel.

Facts

The following facts are uncontested. HFS, Inc. is the parent company of Days Inns of America, Inc. Days Inns of America licenses the use of its trademark to over 1,700 hotels across the United States. Days Inns of America enters into license agreements with persons or entities who own and operate the individual Days Inn hotels. Days Inns of America

provides to its licensees a national reservation system, service marks, marketing systems, franchise services, employee training assistance and other services. Licensees pay fees to Days Inns of America. Licensees are required to maintain certain minimum standards. The license agreement requires that the individual licensee obtain approval from Days Inns of America prior to commencement of construction of an individual hotel. Days Inns of America at times make comments on individual hotel plans, and may addre.. accessibility for disabled guests with individual hotels.

In order to ensure uniformity and consistency across the nation, Days Inns of America inspects individual hotels several times each year. Additionally, Days Inns of America provides operating manuals to its licensees, including the Planning and Design Standards Manual. The Days Inns of America Planning and Design Standards Manual reflects minimum standards. The Manual is used nationwide, and of course, does not contain individual blueprints for individual hotels. The Manual requires corporate approval of individual hotel plans to ascertain initial compliance with Days Inns of America standards. The Manual includes language assigning the burden of compliance with federal and state regulations to individual licensees.

In the instant case, Days Inns of America entered into a license agreement with Panchel & Patel Inc. for the construction of a Champaign, Illinois Days Inn hotel. Panchel & Patel hired an architect and oversaw construction of the hotel. Panchel & Patel submitted plans to Days Inns of America for review. At one point an HFS Design & Construction Manager reviewed the Champaign construction plans and made suggestions. There was an ongoing interactive relationship between HFS, Days Inns of America and Panchal & Patel during the design and construction of the Champaign Days Inn hotel.

Since its completion, the Champaign hotel has undergone several inspections by Days Inns of America. During these inspections, Days Inns of America checks for compliance in a variety of areas. Panchel & Patel are of course responsible for the day to day maintenance and operation of the hotel, but they are also regulated through their licensing agreement, by Days Inns of America.

Americans With Disabilities Act (ADA)

The purpose of the ADA is to provide "a clear and comprehensive mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101 (b)(1). The courts, in accordance with the mandates of Congress are to work to "end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforceable standards addressing discrimination against individuals with disabilities, and to ensure that the Federal government plays a central role in enforcing these standards on behalf of individuals with disabilities." A&P Comm. Print 1990 (28A) (U.S.House of Representatives Committee on Education and Labor Report)

The Congress found that "some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing." A&P 136 Cong. Record D623. "Individuals with disabilities have been denied for so long, services, jobs, housing, transportation, hotel rooms . . ." A&P Comm. Print 1990(28B) (statement of Representative Jeffords). "Disabled people are frequently frustrated by the inaccessibility of hotel rooms. Very few rooms, even in new hotels are made fully accessible." A&P 136 Cong. Rec. D646 (statement of Representative Hayes). The ADA was enacted to address the discrimination against disabled Americans in

all aspects of their lives, including eliminating discrimination in hotel accommodations.

Design and Construct

Congress' concern that all newly constructed hotels be accessible was codified in §303 of the ADA:

> § 12183. New construction and alterations in public accommodation and commercial facilities.
> (a) Application of term
> Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes--
> (1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter;

42 USCA §12183 (emphasis added).

Both parties and the court agree that the Champaign Days Inn hotel is a "new construction" of a "commercial facilit[y]" under 42 U.S.C. § 12183(§303). Liability under that statutory section is assigned to those who "design and construct" the facility. The first statutory interpretation issue is, therefore, did the corporate defendants, Days Inns of America and HFS, "design and construct" the Champaign Days Inn hotel within the meaning of the ADA.

Days Inns of America designs and constructs hotels in that it carefully licenses and regulates and contributes to the planning of, and building of, hotels across the nation. Days Inns of America has much to do with the design and construction of individual hotels such as the Champaign, Illinois Days Inn hotel. Days Inns of America cannot shirk responsibility for following federal law in its ongoing involvement in the design and construction of hotels. "Design and construct" is a broad sweep of liability, it includes architects, builders, planners, and most definitely national hotel licensing corporations which exist for the sole purpose of ensuring that new hotels are designed and constructed in accordance with acceptable standards. The defendants in this case, Days Inns of America and its parent, do indeed "design and construct" hotels.

The plain language of §303 states that new construction of commercial facilities must be readily accessible to and usable by individuals with disabilities." If newly constructed commercial facilities are not accessible then those who designed and constructed them are in violation of the law. The recently constructed Champaign Days Inn hotel allegedly is not readily accessible and usable by individuals with disabilities, and therefore those responsible for its design and construction are liable under the ADA. The defendants Days Inns of America and its parent corporation, HFS, fall easily into the "design and construct" language of §303.

The court notes that it disagrees with the analysis of the factually distinguishable case of *Paralyzed Veterans of America v. Ellerbe Becket Architects*, 945 F.Supp. 1 (D.D.C. 1996) *aff'd*, 117 F.3d 579 (D.C. Cir. 1997) *cert. denied*,---- S.Ct---- (Mar. 9, 1998). That case found architects not liable under §303 because the architects only designed and did not construct the inaccessible facility. "The phrase 'design and construct' is distinctly conjunctive. It refers only to parties responsible for both functions." *Paralyzed Veterans of*

America, 945 F.Supp. at 2. This court finds such a narrow, literal reading of the statute inappropriate to carry out the intent of the ADA. *Paralyzed Veterans* correctly notes that the "and" in "design and construct" is a conjunctive term, but does this obvious grammatical truth necessarily require a narrow reading of liability? "Design and construct" may be read conjunctively without being read narrowly. "Design and construct" enforce each other in that those who design or construct also construct and design.

In the case at bar, a conjunctive reading of "design and construct" does not exonerate Days Inns of America and HFS. These corporate defendants were involved contractually and in a supervisory role with both the design of the Champaign Days Inn hotel and its construction. The record shows the corporate defendants reviewed the design in the planning stage of the project and that the corporate defendants continued to be involved through review and correspondence throughout the construction of the hotel.

Own, Lease or Operate

The defendants argue that the provisions of §303 as to accessibility of new construction are ambiguous and therefore require incorporation of the "own, lease or operate" language of a separate statutory provision - §302's public accommodations provisions:

> § 12182 Prohibition of discrimination by public accommodations
> (a) General rule
> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any

> person who owns, leases (or leases to) or operates a place of public accommodation.

42 U.S.C. § 12182 (emphasis added).

Congress did not choose to include the "own, lease or operate" language into the new construction of commercial facilities provisions of §303. The inclusion of that language in the new construction of commercial facilities provisions would negate the plain language of the statute and would require a Congressional intent analysis on the part of the court. There are two non-binding cases which use the "own, lease or operate" language from §302 to restrict new construction of commercial facilities liability under §303. *See, Neff v. American Dairy Queen*, 58 F.3d 1063 (5th Cir.) *cert. denied*, 116 S.Ct. 704 (1996) (holding a national licensing corporation not liable under the ADA because it did not own or operate a local franchise); *Paralyzed Veterans of America v. Ellerbe Becket Architects*, 945 F.Supp. 1 (D.D.C. 1996) *aff'd*, 117 F.3d 579 (D.C. Cir. 1997) *cert. denied* ----- S.Ct ----- (Mar. 9, 1998) (holding architects not liable under the ADA because they do not own, lease or operate).

The court finds the two cases rejecting judicial transference of §302's "own, lease, or operate" into §303 more persuasive. *Johanson v. Huizenga Holdings, Inc.*, 963 F.Supp. 1175 (S.D.Fla. 1997); *United States v. Ellerbe Becket, Inc.*, 976 F.Supp. 1262 (D.Minn. 1997). In *Johanson* the district court wryly noted that incorporating restrictive "own, lease or operate" language "would effectively eliminate §302's coverage of commercial facilities, despite the language in §302 which explicitly names commercial facilities in connection with the new construction mandate." 963 F.Supp. 1175, 1178 (S.D.Fla. 1997). Similarly, in *Ellerbe Becket*, the court noted that incorporating a restrictive reading of the "own, lease or operate" language results "in an inexplicable gap in coverage of a class of building Congress clearly

intended bo be covered by the accessibility standards for new construction." 976 F.Supp. at 1267. The defendants in the instant case, like the defendants in *Johanson and Ellerbe Becket* argue for a judicial transference of statutory language which when accomplished would make it "conceivable that no entity would be liable for construction of a new commercial facility which violates the ADA." *Ellerbe Becket*, 976 F.Supp. at 1268 (quoting *Johanson*, 963 F.Supp. at 1178).

In the alternative, even if Congress did intend "own, lease or operate" to apply to new construction of commercial facilities under §303, that does not necessarily allow Days Inns of America or HFS Inc. to escape liability. It is appropriate to find Days Inns of America and HFS liable as operators of the Champaign Days Inn hotel. There is legislative history to support that corporate franchising chains are indeed liable under the "own, lease or operate" language of the statute.

In a House of Representatives Committee on Education and Labor Report section 302's "own, lease or operate language" is said to "clarify that the owner of a public accommodation is liable for discriminatory policies. For example, if the corporate headquarters for a chain of restaurants designs all new restaurants to contain barriers to access, an injunction could be brought against the corporation to enjoin the inaccessible new construction." A&P ADA Comm. Print 1990 (28A). In a congressional debate, Representative Fish stated in reference to §302 that "the amendment (§302) also makes it clear that the owner and operator of the public accommodation are prohibited from discriminating in accordance with this title. Corporate headquarters would be covered to the same extent as the operator of the accommodation. For example, corporate headquarters could not continue to design new stores in an inaccessible manner in violation of §303." A&P 136 Cong. Record D646.

In light of the congressional record's clear statement that §302's "own, lease or operate" language includes corporate headquarters, it is untenable to argue that Congress intended the instant corporate defendants to be free from liability. Corporate headquarters, such as Days Inns of America and HFS should "not continue to design new stores [hotels] in an inaccessible manner in violation of §303." A&P 136 Cong. Record D646 (statement of Representative Fish).

Conclusion

The uncontested facts in this case support holding as a matter of law, that the defendants, Days Inns of America, Inc. and its parent company, HFS, Inc., are liable for any violations of the ADA in the construction of the Champaign, Illinois, Days Inn hotel. The case will proceed on the factual issues of identifying specific violations of the ADA's accessibility requirements and assessing damages.

IT IS THEREFORE ORDERED THAT:

(1) The defendants' motion for summary judgment (docket #5 3) is denied.

(2) The plaintiff's motion for summary judgment (docket #49) is granted in part as to the issue of liability.

(3) The case is set for a Rule 16 hearing for further scheduling and case management on April 16, 1998 at 1:30 p.m. before Judge Baker, United States District Court, Urbana, Illinois.

Enter this 16th day of March, 1998

/s/

HAROLD A. BAKER
SENIOR UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 96-26

UNITED STATES OF AMERICA, PLAINTIFF,

V. **MEMORANDUM OPINION AND ORDER**

DAYS INNS OF AMERICA, INC., ET AL., DEFENDANTS.

* * * * *

This matter is before the Court on cross-motions for summary judgment. [Record Nos. 32, 58]. At the parties' request, oral arguments were held before the Court on September 22, 1998. Fully briefed, this matter is now ripe for decision. The Court, having reviewed the record and the memoranda submitted by the parties, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

The case at bar is one of five cases in several federal district courts in which Plaintiff has brought suit against Defendants Days Inns of America, Inc. (hereinafter "DIA") and its parent corporation, HFS, Inc., for allegedly violating § 303 of the Americans with Disabilities Act (hereinafter "ADA"), 42 U.S.C. § 12183. In the case at bar, the violations pertain only to the Days Inn hotel in Hazard, Kentucky.

§ 303 states as follows:

> New construction and alterations in public accommodations and commercial facilities
>
> (a) Application of term
>
> Except as provided in subsection (b) of this section, as applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title includes--
>
> (1) a failure to design and construct facilities for first occupancy later than 30 months after July 26, 1990, that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter . . .

In general, the violations alleged against the defendants fall into three categories: (1) conditions that resulted in unequal treatment for individuals with disabilities; (2) conditions that made it difficult or impossible for individuals with disabilities to gain access to or use some area or feature of the hotel; (3) conditions that presented potential safety hazards for individuals with disabilities.

When this matter was originally filed, it included Defendants Hazard Management Group, Inc., owner of the Days Inn in Hazard, Kentucky, J. Douglas Kidd, architect for said hotel, and Napier-Sebastian Construction, general contractor for said hotel. The aforementioned defendants have since agreed with Plaintiff to make all necessary repairs to conform to ADA standards and thus, have been dismissed

from this matter. DIA and HFS, Inc., however, state that liability under § 303 is limited to owners, operators, lessors, and lessees of places of public accommodation and commercial facilities, and not to every entity who participates in the design and control of said accommodations and facilities.

Additionally, DIA and HFS, Inc. state that they are not an operator of the Hazard Days Inn, nor are they an operator of any other lodging facility which bears the Days Inn name. DIA and HFS, Inc. further state that they did not participate in the design or construction of the Hazard Days Inn or any other Days Inn hotel.

Plaintiff urges the Court to interpret § 303 very broadly by looking to Congress's chief purpose in enacting the ADA. Said purpose was to provide "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 28 U.S. C. § 12101 (b) (1) . Plaintiff states that the defendants were extensively involved in, and had extensive control over, the design and construction of the Hazard Days Inn, as well as control over the operation of the hotel. This involvement, according to Plaintiff, makes the defendants liable for violating § 303.

CONCLUSIONS OF LAW

A. Standard for Summary Judgment

Under Fed. R. Civ. P. 56(c), summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for

summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986)(emphasis omitted).

B. Interpretation of the ADA

Congress's efforts to ensure full and equal enjoyment of public facilities to all citizens is centered in two sections of the ADA. § 302 of the ADA, 42 U.S.C. § 12182, prohibits discrimination in existing facilities by holding accountable all owners, operators, lessors, or lessees of public accommodations who fail to create accessibility for disabled individuals to that establishment's "goods, services, facilities, privileges, advantages, or accommodations." *Id.* Congress defines public accommodations very broadly, and includes inns and hotels in its definition. 42 U.S.C. § 12181(7). Realizing the enormous costs that these accommodations may incur, Congress requires under § 302, only modest expenditures to provide access to the existing facilities. H.R. Rep. No. 101-485(III), at 62 (1990), *reprinted in* U.S.C.C.A.N. 267, 486. For all new construction and alterations, however, Congress implemented § 303, which demands complete accessibility. In an attempt to cover even more public arenas, Congress included in § 303, the term commercial facilities, which are defined as all facilities that are "intended for nonresidential use" whose "operations will affect commerce." 42 U.S.C. 12181(2). Every aspect of these new facilities must comply with ADA standards.

Although § 302 plainly states that owners, operators, lessors, and lessees are liable for ADA violations, § 303 does not contain the same readily identifiable language. Plaintiff argues that the liable parties are all entities involved in the design and construction of the facilities referred to in 302. Defendants, however, argue that Congress intended all

owners, operators, lessors, and lessees to be liable, just as those entities are liable in § 302.

The two sections at issue were initially drafted as part of a single statutory section.[1] As an effort to narrow the definition of "public accommodation" and create a broader group of facilities subject to ADA compliance, Congress drafted §§ 302 and 303. Based on the similarities in the purpose and in the drafting of §§ 302 and 303, it is apparent to this Court that Congress intended to limit liability under § 303 to owners, operators, lessors, and lessees. Failing to use § 302 as a guidepost for liability would result in the consequence of an illogical limit to the reach of § 303. Using language such as "design and construct" to guide liability would leave subcontractors, material suppliers, and similar entities faced with responsibilities which Congress never intended.[2]

§ 303 itself refers back to § 302 in a manner that makes it clear that the prohibitions relating to new construction apply to owners, operators, lessors, and lessees. It follows that this reference to § 302 was Congress's intention of continuing the same scope of liability. The Sixth Circuit has held that "when two or more statutes deal with the same subject, they are to be read in *pari materia* and harmonized if possible." *Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 262 (6th Cir. 1984). The statutory construction advocated by the plaintiff

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[1] S. 933, 101st Cong., 1st Sess. (1989) was originally entitled "Public Accommodations and Services Operated by Private Entitles" and it later became Title III. § 402 of Senate Bill 933 eventually became §§ 302 and 303 of the ADA.

[2] The district court in *Paralyzed Veterans of America v. Ellerbe Becket Architects*, 945 F.Supp. 1 (D.D.C. 1996), came to a very similar conclusion when it held that architects were not liable under the ADA for their failure to design and construct facilities in accordance with §§ 302 and 303.

would work against this principle as it would dangerously expand the reach § 303.

Congress stated clearly in § 302 that the liable parties were to consist of owners, operators, lessors, and lessees. Had Congress intended to extend liability further in § 303, it could have easily done so. Instead § 303 is devoid of any additional entity that is subject to compliance with ADA standards.

C. Defining "Operator"

To find liability under § 303, the plaintiff also attempts to classify the defendants as an operator of the hotel in Hazard. Plaintiff initially focuses on the defendants control over the initial design and construction of the hotel and control through the defendants, license agreement with the franchisee. Next, Plaintiff points to control through the standard operating manual given to each Days Inn hotel and the Hospitality Management Training program provided to the owner of each hotel. Plaintiff also suggests that DIA's random quality assurance inspection of each hotel, which occurs three times a year, warrants the finding that the defendants are the operator of the Hazard Days Inn.

There are two prevalent theories used to determine who is an operator under the ADA. The first test comes from the Fifth Circuit ADA decision of *Neff v. American Dairy Queen Corp*, 58 F.3d 1063, 1065 (5th Cir. 1995), and states that a franchisor is not an operator if the "franchise agreement established no more than that the [franchisor] held the power to veto modifications to the [franchisees] facilities." The relevant inquiry in this matter focuses on whether the franchisor "specifically controls the modification of the franchises to improve their accessibility to the disabled". *Id.* at 1066. In essence, to be classified as an operator, the franchisor must in some way actually cause the franchisee to

comply or not to comply with the ADA. In the case at bar, the license agreement gave the defendants a type of supervisory or veto power pertaining to the construction of the facilities. The agreement specifically provided that DIA's review and approval of the facilities' plans were solely for the purpose of determining compliance with DIA's system standards and not for determining whether those plans satisfied legal requirements such as ADA standards. The agreement specifically stated that the franchisee was the party responsible for constructing and operating the facility in compliance with all legal requirements. Thus, the defendants have no control over the facility's compliance with the ADA.

The manual given to each franchisee includes among other information, grooming and attire for hotel employees, hours of operation of the front desk, and services that must be provided to guests such as wake-up calls and complimentary coffee. Also included are requirements for the provision of, and often the number and location of, pictures, desks, tables, chairs, televisions, mirrors, towel racks, ashtrays, and other similar hotel room items. The manual does not control, nor attempt to control, modification of the franchise. It merely provides the defendants' recommendations for properly running a Days Inn hotel. Thus, DIA cannot be classified as an operator under the *Neff* standard as these guidelines relate, instead, to the maintenance of quality of the hotel.

The training programs for managers and employees of all Days Inn Hotels cover guest relation services, setting room rates, motivating and managing hotel personnel, and similar topic areas. These training sessions are far from the control over structural modification necessary to qualify as an operator under *Neff*.

It appears that the purpose for the quality assurance inspections of each hotel is not for maintaining control over the hotel but to rate each hotel with regard to its compliance with the operating manual provided by the defendants. The

ratings of each hotel are then published by the defendants in a Days Inn directory and distributed to the public at no charge at every Days Inn hotel, the Days Inn reservation center, and the Days Inn World Wide Web site. Franchisees are eager to achieve high ratings as it translates into an increase in the number of guests as well as personal pride for the franchisee and his or her employees. Again, the Court can find no specific control over the modifications of the franchise and thus the inspection program does not cause the defendants to become an operator of the Hazard Days Inn.

The other theory in which the defendants may be classified as an operator is whether they maintain control over the day-to-day operations of the hotel. The Court finds that any influence that the defendants may have on the day-today operations of the hotel through the manual, training sessions, or rating systems is not "control" over the hotel in the ordinary sense. While the Court finds that these mechanisms do indeed influence the way in which the franchisee operates the hotel, the purpose of these mechanisms is to improve the quality of the experience of the hotel guest, rather than for the purpose of controlling the structural modification of each hotel. Due to the commercial nature of the relationship between the franchisor and the franchisee, some degree of control would appear to be inherent, and has even been judicially accepted, to some extent, as the trademark name "Days Inn" and the quality put forth by the franchisee is a direct reflection on the franchisor. *See, Drexel v. Union Prescription Centers, Inc.*, 582 F.2d 781, 785-86 (5th Cir. 1978). Ultimately, the defendants cannot be considered an operator based on their day-to-day influence on the Days Inn hotel.

The defendants are not liable for any violation of § 303 of the ADA that occurred in the Hazard Days Inn hotel. Congress did not intend to find franchisors, such as the defendants, liable under § 303 and said statute is limited to

owners, operators, lessors, and lessees of public accommodations and commercial facilities. Additionally, the defendants did not exercise any type of control over the Hazard Days Inn that would warrant classifying them as an operator of such establishment.

IT IS HEREBY ORDERED:

(1) That the defendants' motion for summary judgment be, and the same hereby is, **GRANTED;**

(2) That the plaintiff's cross-motion for summary judgment be, and the same hereby is, **DENIED.**

This is the 30th day of September, 1998.

/s/
JOSEPH M. HOOD, JUDGE

Date of Entry and Service:

Subpart D-New Construction and Alterations

Subpart D implements section 303 of the Act, which requires that newly constructed or altered places of public accommodation or commercial facilities be readily accessible to and usable by individuals with disabilities. This requirement contemplates a high degree of convenient access. It is intended to ensure that patrons and employees of places of public accommodation and employees of commercial facilities are able to get to, enter, and use the facility.

Potential patrons of places of public accommodation, such as retail establishments, should be able to get to a store, get into the store, and get to the areas where goods are being provided. Employees should have the same types of access, although those individuals require access to and around the employment area as well as to the area in which goods and services are provided.

The ADA is geared to the future--its goal being that, over time, access will be the rule, rather than the exception. Thus, the Act only requires modest expenditures, of the type addressed in §36.304 of this part, to provide access to existing facilities not otherwise being altered, but requires all new construction and alterations to be accessible.

The Act does not require new construction or alterations; it simply requires that, when a public accommodation or other private entity undertakes the construction or alteration of a facility subject to the Act, the newly constructed or altered facility must be made accessible. This subpart establishes the requirements for new construction and alterations.

As explained under the discussion of the definition of "facility," §36.104, pending development of specific requirements, the Department will not apply this subpart to

places of public accommodation located in mobile units, boats, or other conveyances.

Section 36.401 New Construction

General

Section 36.401 implements the new construction requirements of the ADA. Section 303 (a)(1) of the Act provides that discrimination for purposes of section 302(a) of the Act includes a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment (i.e., after January 26, 1993) that are readily accessible to and usable by individuals with disabilities.

Paragraph 36.401(a)(1) restates the general requirement for accessible new construction. The proposed rule stated that "any public accommodation or other private entity responsible for design and construction" must ensure that facilities conform to this requirement. Various commenters suggested that the proposed language was not consistent with the statute because it substituted "private entity responsible for design and construction" for the statutory language; because it did not address liability on the part of architects, contractors, developers, tenants, owners, and other entities; and because it limited the liability of entities responsible for commercial facilities. In response, the Department has revised this paragraph to repeat the language of section 303(a) of the ADA. The Department will interpret this section in a manner consistent with the intent of the statute and with the nature of the responsibilities of the various entities for design, for construction, or for both.

Designed and Constructed for First Occupancy

According to paragraph (a)(2), a facility is subject to the new construction requirements only if a completed application for a building permit or permit extension is filed after January 26, 1992, and the facility is occupied after January 26, 1993.

The proposed rule set forth for comment two alternative ways by which to determine what facilities are subject to the Act and what standards apply. Paragraph (a)(2) of the final rule is a slight variation on Option One in the proposed rule. The reasons for the Department's choice of Option One are discussed later in this section.

Paragraph (a)(2) acknowledges that Congress did not contemplate having actual occupancy be the sole trigger for the accessibility requirements, because the statute prohibits a failure to "design and construct for first occupancy," rather than requiring accessibility in facilities actually occupied after a particular date.

The commenters overwhelmingly agreed with the Department's proposal to use a date certain; many cited the reasons given in the preamble to the proposed rule. First, it is helpful for designers and builders to have a fixed date for accessible design, so that they can determine accessibility requirements early in the planning and design stage. It is difficult to determine accessibility requirements in anticipation of the actual date of first occupancy because of unpredictable and uncontrollable events (e.g., strikes affecting suppliers or labor, or natural disasters) that may delay occupancy. To redesign or reconstruct portions of a facility if it begins to appear that occupancy will be later than anticipated would be quite costly. A fixed date also assists those responsible for enforcing, or monitoring compliance with, the statute, and those protected by it.

The Department considered using as a trigger date for application of the accessibility standards the date on which a permit is granted. The Department chose instead the date on which a complete permit application is certified as received by the appropriate government entity. Almost all commenters agreed with this choice of a trigger date. This decision is based partly on information that several months or even years can pass between application for a permit and receipt of a permit. Design is virtually complete at the time an application is complete (i.e., certified to contain all the information required by the State, county, or local government). After an application is filed, delays may occur before the permit is granted due to numerous factors (not necessarily relating to accessibility): for example, hazardous waste discovered on the property, flood plain requirements, zoning disputes, or opposition to the project from various groups. These factors should not require redesign for accessibility if the application was completed before January 26, 1992. However, if the facility must be redesigned for other reasons, such as a change in density or environmental preservation, and the final permit is based on a new application, the rule would require accessibility if that application was certified complete after January 26, 1992.

The certification of receipt of a complete application for a building permit is an appropriate point in the process because certifications are issued in writing by governmental authorities. In addition, this approach presents a clear and objective standard.

However, a few commenters pointed out that in some jurisdictions it is not possible to receive a "certification" that an application is complete, and suggested that in those cases the fixed date should be the date on which an application for a permit is received by the government agency. The Department has included such a provision in §36.401(a)(2)(i).

The date of January 26, 1992, is relevant only with respect to the last application for a permit or permit extension for a facility. Thus, if an entity has applied for only a "foundation" permit, the date of that permit application has no effect, because the entity must also apply for and receive a permit at a later date for the actual superstructure. In this case, it is the date of the later application that would control, unless construction is not completed within the time allowed by the permit, in which case a third permit would be issued and the date of the application for that permit would be determinative for purposes of the rule.

* * * * *

Calendar No. 216

101ST CONGRESS
1ST SESSION

S. 933

[Report No. 101-116]

To establish a clear and comprehensive prohibition of discrimination on the basis of disability.

IN THE SENATE OF THE UNITED STATES

MAY 9 (legislative day, JANUARY 3), 1989

Mr. HARKIN (for himself, Mr. KENNEDY, Mr. DURENBERGER, Mr. SIMON, Mr. JEFFORDS, Mr. CRANSTON, Mr. MCCAIN, Mr. MITCHELL, Mr. CHAFEE, Mr. LEAHY, Mr. STEVENS, Mr. INOUYE, Mr. COHEN, Mr. GORE, Mr. PACKWOOD, Mr. RIEGLE, Mr. GRAHAM, Mr. PELL, Mr. DODD, Mr. ADAMS, Ms. MIKULSKI, Mr. METZENBAUM, Mr. MATSUNAGA, Mr. WIRTH, Mr. BINGAMAN, Mr. CONRAD, Mr. BURDICK, Mr. LEVIN, Mr. LIEBERMAN, Mr. MOYNIHAN, Mr. KERRY, Mr. SARBANES, Mr. BOSCHWITZ, Mr. HEINZ, Mr. GLENN, Mr. SHELBY, Mr. PRESSLER, Mr. HOLLINGS, Mr. SANFORD, Mr. WILSON, Mr. SASSER, Mr. DIXON, Mr. KERREY, Mr. ROBB, Mr. FOWLER, Mr. ROCKEFELLER, Mr. BIDEN, Mr. BENTSEN, Mr. SPECTER, Mr. DECONCINI, Mr. KOHL, Mr. LAUTENBERG, Mr. D'AMATO, Mr. DOLE, Mr. HATCH, Mr. WARNER, Mr. PRYOR, and Mr. BRADLEY) introduced the following bill; which was read twice and referred to the Committee on Labor and Human Resources

AUGUST 30, 1989

Reported, under authority of the order of the Senate of August 2 (legislative day, January 3), 1989, by Mr. KENNEDY, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To establish a clear and comprehensive prohibition of discrimination on the basis of disability.

BEST AVAILABLE COPY

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

~~SECTION 1. SHORT TITLE; TABLE OF CONTENTS.~~

~~(a) SHORT TITLE.—This Act may be cited as the "Americans with Disabilities Act of 1989".~~

~~(b) TABLE OF CONTENTS.—The table of contents is as follows:~~

~~Sec. 1. Short title; table of contents.~~
~~Sec. 2. Findings and purposes.~~
~~Sec. 3. Definitions.~~

~~TITLE I—GENERAL PROHIBITION AGAINST DISCRIMINATION~~

~~Sec. 101. Forms of discrimination prohibited.~~

~~TITLE II—EMPLOYMENT~~

~~Sec. 201. Definitions.~~
~~Sec. 202. Discrimination.~~
~~Sec. 203. Posting notices.~~
~~Sec. 204. Regulations.~~
~~Sec. 205. Enforcement.~~

~~TITLE III—PUBLIC SERVICES~~

~~Sec. 301. Definition of qualified individual with a disability.~~
~~Sec. 302. Discrimination.~~
~~Sec. 303. Actions applicable to public transportation considered discriminatory.~~
~~Sec. 304. Regulations.~~
~~Sec. 305. Enforcement.~~

~~TITLE IV—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES~~

~~Sec. 401. Definitions.~~
~~Sec. 402. Prohibition of discrimination by public accommodations.~~
~~Sec. 403. Prohibition of discrimination in public transportation services provided by private entities.~~
~~Sec. 404. Regulations.~~
~~Sec. 405. Enforcement.~~

~~TITLE V—TELECOMMUNICATIONS RELAY SERVICES~~

~~Sec. 501. Definitions.~~
~~Sec. 502. Telecommunications relay services.~~
~~Sec. 503. Regulations.~~
~~Sec. 504. Enforcement.~~

TITLE IV—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

SEC. 401. DEFINITIONS.

As used in this title:

(1) COMMERCE.—The term "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State or between any foreign country or any territory or possession and any State or the District of Columbia or between points in the same State but through another State or the District of Columbia or foreign country.

(2) PUBLIC ACCOMMODATION.—

(A) IN GENERAL.—The term "public accommodation" means privately operated establishments—

(i)(I) that are used by the general public as customers, clients, or visitors; or

(II) that are potential places of employment; and

(ii) whose operations affect commerce.

(B) INCLUSIONS.—Public accommodations referred to in clause (i)(I) include auditoriums, convention centers, stadiums, theaters, restau-

rants, shopping centers, inns, hotels, and motels (other than inns, hotels, and motels exempt under section 201(b)(1) of the Civil Rights Act of 1964 (42 U.S.C. 2000a(b)(1))), terminals used for public transportation, passenger vehicle service stations, professional offices of health care providers, office buildings, sales establishments, personal and public service businesses, parks, private schools, and recreation facilities.

(3) PUBLIC TRANSPORTATION.—The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than by air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

SEC. 402. PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOMMODATIONS.

(a) GENERAL RULE.—No individual shall be discriminated against in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, on the basis of disability.

(b) CONSTRUCTION.—As used in subsection (a), the term "discriminated against" includes—

~~(1) the imposition or application of eligibility criteria that identify or limit, or tend to identify or limit, an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations;~~

~~(2) a failure to make reasonable modifications in rules, policies, practices, procedures, protocols, or services when such modifications may be necessary to afford such privileges, advantages, and accommodations unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such privileges, advantages, and accommodations;~~

~~(3) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would result in undue burden;~~

~~(4)(A) a failure to remove architectural and communication barriers that are structural in nature in existing facilities, and transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be re-~~

moved through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable; and

(B) where an entity can demonstrate that removal of a barrier under subparagraph (A) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, and accommodations available through alternative methods if such methods are readily achievable;

(5) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment later than one year after the date of enactment of this Act in a manner that affects or could affect the usability of the facility or part thereof, a failure to make the alterations in such a manner that, to the maximum extent feasible, the altered portion of the facility, the path of travel to the altered area, and the bathrooms, telephones, and drinking fountains serving the remodeled area, are readily accessible to and usable by individuals with disabilities;

(6) a failure to make facilities constructed for first occupancy later than 30 months after the date of enactment of this Act readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to do

so, in accordance with standards set forth or incorporated by reference in regulations issued under this title; and

(7) in the case of an entity that uses a vehicle to transport individuals not covered under section 302 or 402—

(A) a failure to provide a level of transportation services to individuals with disabilities, including individuals who use wheelchairs, equivalent to that provided for the general public; and

(B) purchasing or leasing a new bus, or vehicle that can carry in excess of 12 passengers, for which solicitations are made later than 30 days after the date of enactment of this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

SEC. 402. PROHIBITION OF DISCRIMINATION IN PUBLIC TRANSPORTATION SERVICES PROVIDED BY PRIVATE ENTITIES.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people, but is not in the principal busi-

SEC. 205. ENFORCEMENT.

The remedies, procedures, and rights set forth in section 505 of the Rehabilitation Act of 1973 (29 U.S.C. 794a) shall be available with respect to any individual who believes that he or she is being subjected to discrimination on the basis of disability in violation of this Act, or regulations promulgated under section 204, concerning public services.

SEC. 206. EFFECTIVE DATE.

(a) IN GENERAL.—Except as provided in subsection (b), this title shall become effective 18 months after the date of enactment of this Act.

(b) FIXED ROUTE VEHICLES.—Section 203(b)(1), as regarding new fixed route vehicles, shall become effective on the date of enactment of this Act.

TITLE III—PUBLIC ACCOMMODATIONS AND SERVICES OPERATED BY PRIVATE ENTITIES

SEC. 301. DEFINITIONS.

As used in this title:

(1) COMMERCE.—The term "commerce" means travel, trade, traffic, commerce, transportation, or communication—

(A) among the several States;

(B) between any foreign country or any territory or possession and any State; or

(C) between points in the same State but through another State or foreign country.

(2) POTENTIAL PLACES OF EMPLOYMENT.—The term "potential places of employment" means facilities—

(A) that are intended for nonresidential use; and

(B) whose operations will affect commerce.

Such term shall not include facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968 (42 U.S.C. 3601 et seq.).

(3) PUBLIC ACCOMMODATION.—The following privately operated entities are considered public accommodations for purposes of this title, if the operations of such entities affect commerce—

(A) an inn, hotel, motel, or other similar place of lodging, except for an establishment located within a building that contains not more than five rooms for rent or hire and that is actually occupied by the proprietor of such establishment as the residence of such proprietor;

(B) a restaurant, bar, or other establishment serving food or drink;

(C) a motion picture house, theater, concert hall, stadium, or other place of exhibition or entertainment;

(D) an auditorium, convention center, or lecture hall;

(E) a bakery, grocery store, clothing store, hardware store, shopping center, or other similar retail sales establishment;

(F) a laundromat, dry-cleaners, bank, barber shop, beauty shop, travel service, shoe repair service, funeral parlor, gas station, office of an accountant or lawyer, pharmacy, insurance office, professional office of a health care provider, hospital, or other similar service establishment;

(G) a terminal used for public transportation;

(H) a museum, library, gallery, and other similar place of public display or collection;

(I) a park or zoo;

(J) a nursery, elementary, secondary, undergraduate, or postgraduate private school;

(K) a day care center, senior citizen center, homeless shelter, food bank, adoption program, or other similar social service center; and

(L) a gymnasium, health spa, bowling alley, golf course, or other similar place of exercise or recreation.

(4) PUBLIC TRANSPORTATION.—The term "public transportation" means transportation by bus or rail, or by any other conveyance (other than by air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

(5) READILY ACHIEVABLE.—

(A) IN GENERAL.—The term "readily achievable" means easily accomplishable and able to be carried out without much difficulty or expense.

(B) DETERMINATION.—In determining whether an action is readily achievable, factors to be considered include—

(i) the overall size of the covered entity with respect to number of employees, number and type of facilities, and the size of budget;

(ii) the type of operation of the covered entity, including the composition and structure of the entity; and

(iii) the nature and cost of the action needed.

SEC. 302. PROHIBITION OF DISCRIMINATION BY PUBLIC ACCOMMODATIONS.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation.

(b) CONSTRUCTION.—

(1) GENERAL PROHIBITION.—

(A) ACTIVITIES.—

(i) DENIAL OF PARTICIPATION.—It shall be discriminatory to subject an individual or class of individuals on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements, to a denial of the opportunity of the individual or class to participate in or benefit from the goods, services, facilities, privileges, advantages, and accommodations of an entity.

(ii) PARTICIPATION IN UNEQUAL BENEFIT.—It shall be discriminatory to afford an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements

with the opportunity to participate in or benefit from a good, service, facility, privilege, advantage, and accommodation that is not equal to that afforded to other individuals.

(iii) SEPARATE BENEFIT.—It shall be discriminatory to provide an individual or class of individuals, on the basis of a disability or disabilities of such individual or class, directly, or through contractual, licensing, or other arrangements with a good, service, facility, privilege, advantage, or accommodation that is different or separate from that provided to other individuals, unless such action is necessary to provide the individual or class of individuals with a good, service, facility, privilege, advantage, or accommodation, or other opportunity that is as effective as that provided to others.

(B) INTEGRATED SETTINGS.—Goods, facilities, privileges, advantages, accommodations, and services shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual.

(C) OPPORTUNITY TO PARTICIPATE.—Notwithstanding the existence of separate or different

programs or activities provided in accordance with this section, an individual with a disability shall not be denied the opportunity to participate in such programs or activities that are not separate or different.

(D) ADMINISTRATIVE METHODS.—An individual or entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration—

(i) that have the effect of discriminating on the basis of disability; or

(ii) that perpetuate the discrimination of others who are subject to common administrative control.

(E) ASSOCIATION.—It shall be discriminatory to exclude or otherwise deny equal goods, services, facilities, privileges, advantages, and accommodations, or other opportunities to an individual or entity because of the known disability of an individual with whom the individual or entity is known to have a relationship or association.

(2) SPECIFIC PROHIBITIONS.—

(A) DISCRIMINATION.—As used in subsection (a), the term "discrimination" shall include—

(i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully and equally enjoying any goods, services, facilities, privileges, advantages, and accommodations, unless such criteria can be shown to be necessary for the provision of the goods, services, facilities, privileges, advantages, or accommodations being offered;

(ii) a failure to make reasonable modifications in policies, practices, procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, and accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such goods, services, facilities, privileges, advantages, and accommodations;

(iii) a failure to take such steps as may be necessary to ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently

than other individual because of the absence of auxiliary aids and services, unless the entity can demonstrate that taking such steps would fundamentally alter the nature of the good, service, facility, privilege, advantage, or accommodation being offered or would result in undue burden;

(iv) a failure to remove architectural barriers, and communication barriers that are structural in nature, in existing facilities, and transportation barriers in existing vehicles used by an establishment for transporting individuals (not including barriers that can only be removed through the retrofitting of vehicles by the installation of a hydraulic or other lift), where such removal is readily achievable;

(v) where an entity can demonstrate that the removal of a barrier under clause (iv) is not readily achievable, a failure to make such goods, services, facilities, privileges, advantages, and accommodations available through alternative methods if such methods are readily achievable;

(vi) with respect to a facility or part thereof that is altered by, on behalf of, or for the use of an establishment in a manner that affects or could affect the usability of the facility or part thereof, a failure to make alterations in such a manner that, to the maximum extent feasible, the altered portions of the facility are readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs, and where the entity is undertaking major structural alterations that affect or could affect the usability of the facility (as defined under criteria established by the Attorney General), the entity shall also make the alterations in such a manner that, to the maximum extent feasible, the path of travel to the altered area and the bathrooms, telephones, and drinking fountains serving the remodeled area, are readily accessible to and usable by individuals with disabilities, except that this paragraph shall not be construed to require the installation of an elevator for facilities that are less than three stories or that have less than 3,000 square feet per story unless

the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

(B) FIXED ROUTE SYSTEM.—

(i) ACCESSIBILITY.—It shall be considered discrimination for an entity that uses a vehicle for a fixed route system to transport individuals not covered under section 203 or 304, to purchase or lease a bus or a vehicle that is capable of carrying in excess of 16 passengers, for which solicitations are made later than 30 days after the effective date of this Act, that is not readily accessible to and usable by individuals with disabilities (including individuals who use wheelchairs), except that over-the-road buses shall be subject to section 304(b)(4) and section 305.

(ii) EQUIVALENT SERVICE.—If such entity purchases or leases a vehicle carrying 16 or less passengers after the effective date of this title that is not readily accessible to or usable by individuals with disabilities, it

shall be discriminatory for such entity to fail to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to the general public.

(C) DEMAND RESPONSIVE SYSTEM.—As used in subsection (a), the term "discrimination" shall include, in the case of a covered entity that uses vehicles in a demand responsive system to transport individuals not covered under section 203 or 304, an incident in which—

(i) such entity purchases or leases a vehicle carrying 16 or less passengers after the effective date of this title, a failure to operate a system that, when viewed in its entirety, ensures a level of service to individuals with disabilities, including individuals who use wheelchairs, equivalent to the level of service provided to the general public; and

(ii) such entity purchases or leases a bus or a vehicle that can carry in excess of 16 passengers for which solicitations are made later than 30 days after the effective date of this Act, that is not readily accessible

to and usable by individuals with disabilities (including individuals who use wheelchairs) unless such entity can demonstrate that such system, when viewed in its entirety, already provides a level of service to individuals with disabilities equivalent to that provided to the general public, except that over-the-road buses shall be subject to section 304(b)(4) and section 305.

SEC. 303. NEW CONSTRUCTION IN PUBLIC ACCOMMODATIONS AND POTENTIAL PLACES OF EMPLOYMENT.

(a) APPLICATION OF TERM.—Except as provided in subsection (b), as applied to a—

(1) public accommodation; and

(2) potential place of employment;

the term "discrimination" as used in section 302(a) shall mean a failure to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this title.

(b) ELEVATOR.—Subsection (a) shall not be construed to require the installation of an elevator for facilities that are less than three stories or have less than 3,000 square feet per story unless the building is a shopping center, a shopping mall, or the professional office of a health care provider or unless the Attorney General determines that a particular category of such facilities requires the installation of elevators based on the usage of such facilities.

SEC. 304. PROHIBITION OF DISCRIMINATION IN PUBLIC TRANSPORTATION SERVICES PROVIDED BY PRIVATE ENTITIES.

(a) GENERAL RULE.—No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people, but is not in the principal business of providing air transportation, and whose operations affect commerce.

(b) CONSTRUCTION.—As used in subsection (a), the term "discrimination against" includes—

(1) the imposition or application by an entity of eligibility criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities from fully enjoying the public transportation services provided by the entity;

governing the construction is that the facility must be "readily accessible to and usable by" people with disabilities.

The phrase "commercial facilities" has been substituted for the phrase "potential places of employment" of H.R. 2273 in order to eliminate any possible confusion between coverage of title III, concerning new construction, and coverage of title I, concerning employment practices. Obviously, there is an intended conceptual connection between the two titles. To the extent that new facilities are built in a manner that make them accessible to all individuals, including potential employees, there will be less of a need for individual employers to engage in reasonable accommodations for particular employees. The legal requirements of the two titles, however, are separate and independent.

The term "commercial facilities," retains the same definition as that given to "potential places of employment" in the Senate bill (S. 933). The new term therefore, is designed solely to eliminate any unnecessary confusion regarding coverage of employers; it is not intended to reduce the scope of the definition (i.e., any facility intended for non-residential use). Further, the term is not intended to be defined by dictionary or common industry definitions. Rather, "commercial facility", which is to be interpreted consistently with "potential places of employment", is defined as in S. 933, broadly to include any facility that is intended for nondresidential use and whose operations will affect commerce. Thus, for example, office buildings, factories, and other places in which employment will occur, come within this definition. The phrase, "whose operations affect commerce," is intended to include the full scope of coverage under federal constitutional commerce clause doctrine.

Section 303(a) of the legislation specifies that it is unlawful discrimination for a public accommodation or commercial facility to fail to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to do so, in accordance with standards set forth or incorporated by reference in regulations issued under title III.

Section 303(b) of the legislation exempts entities from installing elevators under the same circumstances applicable to alternations (see section 302(b)(2)(A)(vi) and the accompanying clarifications in the report).

The phrase "readily accessible to or usable by" is a term of art which, in slightly varied formulations, has been applied in the Architectural Barriers Act of 1968 ("ready access to, and use of"), the Fair Housing Act of 1968, as amended ("readily accessible to and usable by"), and the regulations implementing section 504 of the Rehabilitation Act of 1973 ("readily accessible to and usable by") and is included in standards used by Federal agencies and private industry, e.g., the Uniform Federal Accessibility Standards (UFAS) ("ready access to and use of") and the American National Standard for Buildings and Facilities–Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1) (readily accessible to, and usable by).

The term is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter and

* * * * *

LEGISLATIVE HISTORY
HOUSE REPORT NO. 101-485(III)

PURPOSE OF THE BILL AS AMENDED BY THE COMMITTEE

The purpose of the Americans with Disabilities Act (ADA), H.R. 2273 as amended, is to provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring those individuals into the economic and social mainstream of American life. The ADA provides enforceable standards addressing discrimination against individuals with disabilities and ensures that the federal government will play a central role in enforcing these standards on behalf of individuals with disabilities. Each title specifies the role of federal agencies in promulgating regulations, conducting compliance reviews, pursuing litigation and providing guidance and technical assistance regarding the requirements of the Act.

AMENDMENTS ADOPTED BY THE COMMITTEE

The Committee adopted 5 amendments to the bill ordered reported by the Subcommittee. An amendment added a new section to the bill, Section 513, to encourage the use of alternative dispute resolution where appropriate and to the extent authorized by law. An amendment added additional factors to be considered in making a determination of what constitutes an undue hardship under title I and what is readily achievable under title III. An amendment clarified that the remedies incorporated by reference in titles I, II and III are the remedies that the ADA provides, and that the incorporated remedies are the remedies currently available. If those remedies are amended in the future, such remedies will also apply to the ADA.

An amendment clarified the "direct threat" provision, the phrase "essential functions" of a job, and the "anticipatory discrimination" provision. This amendment also clarified what entities are covered under the general rule of title III, that commercial facilities are covered by the alterations provisions, and that exams and classes relating to applications, licensing, certifications, or credentialing must be held in an accessible place and manner. An amend-

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ment made technical changes to the interim accessibility standards under title III.

HISTORY

Federal civil rights protections for individuals with disabilities were first established by title V of the Rehabilitation Act of 1973.[1] Sections 501 and 503 of the Rehabilitation Act prohibit the federal government and most federal contractors from discriminating in employment, and requires them to use affirmative action to employ persons with disabilities. Section 504 of the Rehabilitation Act goes beyond employment, and prohibits discrimination against persons with disabilities in programs and activities of the federal government and by recipients of federal financial assistance.

The Americans with Disabilities Act was first introduced in 1988 during the 100th Congress.[2] This first bill was drafted by the Na-

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[1] P.L. 93-112, 29 U.S.C. 791, *et seq.*

[2] H.R. 4498, introduced by Mr. Coelho, and S. 2345, by Mr. Weicker.

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Section 302(b)(2)(A)(ii)–Reasonable modifications

It is discriminatory to fail to make reasonable modifications in policies and practices when such modifications are necessary to provide goods or services, unless it can be demonstrated that the modifications would fundamentally alter the nature of the goods or services provided.

For example, it is discriminatory to refuse to alter a "no pets" rule for a person with a disability who uses a guide or service dog. It would not be a violation of this title to refuse to modify a policy of not touching delicate works of art for a person who is blind if the touching threatened the integrity of the work.

Section 302(b)(2)(A)(iii)–Auxiliary aids and services

It is discriminatory to fail to take steps to ensure that a disabled individual is not treated differently because of the absence of auxiliary aids and services, unless it can be demonstrated that the auxiliary aids would fundamentally alter the nature of the goods or services being offered, or would result in an undue burden.

For example, a store would be required to communicate with a person who is deaf by writing down information which is normally spoken (such as indicating the location of the furniture department). It may be an undue burden, however, for the store to provide an inerpreter to convey this information.

The term "undue burden" is analogous to the term "undue hardship" in title I. The determination of whether the provision of an auxiliary aid or service imposes an undue burden on a public accommodation will be made on a case-

by-case basis, taking into account the same standard and factors used for determining an undue hardship.

A critical determination is what constitutes an effective auxiliary aid or service (or reasonable accommodation in the employment context). While the use of handwritten notes may be effective to a person who is deaf in the context of shopping, it may not be an effective means of communication in a training session for employees in the employment context. Likewise, while it may not be necessary to provide braille price tags for shoppers who are visually impaired, it may be necessary to provide braille manuals in the employment context. For this reason, the obligations of a business will vary depending on the context involved.

Open-captioning of feature films playing in movie theaters is not required by this Act. Filmmakers are encouraged, however, to produce and distribute open-captioned versions of films and theaters are encouraged to have at least some pre-announced screenings of captioned versions of feature films.

Sections 302(b)(2)(A)(iv)-(v) and 303-Obligations for existing facilities, alterations and new construction

One major obstacle for persons with disabilities is simply obtaining access into buildings. Buildings have often been constructed in such a manner that persons with disabilities are effectively excluded from such places–they cannot get through the door, get around and use the building, or go to another floor.

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This title sets out accessibility standards for buildings containing public accommodations. Three situations are covered: existing facilities, alternations, and new construction.

This section reflects the balance between the need to provide limited access for persons with disabilities and the desire to impose provide cost on businesses. Because retrofitting existing structures to make them fully accessible is costly, a far lower standard of accessibility has been adopted for existing structures—a standard of "readily achievable." Because it costs far less to incorporate accessible design into the planning and constructing of new buildings and of alterations, a higher standard of "readily accessible to and usable by" persons with disabilities has been adopted in the ADA for new construction and alterations.

The Fair House Amendments Act of 1988 adopted the same "readily accessible to and usable by" standard for common areas in newly constructed multi-family housing units.

"Readily achievable" vs. "readily accessible to and usable by"

The "readily achievable" and "readily accessible" standards are quite different. Readily achievable is defined as meaning an action which is easily accomplishable without much difficulty or expense. In making this determination, many factors are to be taken into consideration, including the overall size of the business, the site involved, and the nature and cost of the action needed. These are the same factors used when determining whether a reasonable accommodation imposes an undue hardship on an employer in title I.[65]

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[65] As noted in the discussion of that title, the standard to be applied to these factors is significantly lower in determining whether an action is

"Readily accessible to and usable by" is a higher standard, and has been used in a number of previous laws requiring accessibility. It is intended to enable persons with disabilities to get to, enter and use a facility. Although it does not mean total accessibility in every part of every area of a facility, it does mean a high degree of convenient accessibility: for example, accessible routes to and throughout a facility, accessible entrances to buildings and spaces, usable bathrooms, water fountains and other features.[66]

For example, many banks provide automatic teller machines (ATMs) for use of their customers. A bank with existing ATMs would have to remove barriers associated with the ATM if removal is readily achievable–easily accomplished without much difficulty or expense. Providing a small ramp to avoid a few steps may be readily achievable, but raising or lowering the ATM may be too difficult or expensive. If no readily achievable changes were possible, then the bank would have to provide service through alternative methods.

For new construction and alterations, the purpose is to ensure that the service offered to persons with disabilities is equal to the service offered to others. It would be a violation of this title to

* * * * *

"readily achievable" than the standard used to determine whether a reasonable accommodation poses an undue hardship.

[66] Additionally, at supermarkets, for example, features erected to discourage the removal of shopping carts must meet established accessibility criteria for doors, including the required clearance, hardware, thresholds and operating pressure to allow for passage of persons with disabilities.

Calendar No. 216

101ST CONGRESS *1st Session*	SENATE	REPORT 101-116

THE AMERICANS WITH DISABILITIES ACT OF 1989

AUGUST 30, 1989.–Ordered to be printed

Filed under authority of the order of the Senate of August 2 (legislative day, January 3), 1989

Mr. KENNEDY, from the Committee on Labor and Human Resources, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 933]

The Committee on Labor and Human Resources, to which was referred the bill (S. 933) to establish a clear and comprehensive prohibition of discrimination on the basis of disability, having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

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I. INTRODUCTION

On August 2, 1989, the Committee on Labor and Human Resources, by a vote of 16-0, ordered favorably reported S 933, the

* * * * *

The phrase "to the maximum extent feasible" has been included to allow for the occasional case in which the nature of an existing facility is such as to make it virtually impossible to renovate the building in a manner that results in its being entirely accessible to and usable by individuals with disabilities. In all such cases, however, the alteration should provide the maximum amount of physical accessibility feasible.

Thus, for example the term "to the maximum extent feasible" should be construed as not requiring entities to make building alterations that have little likelihood of being accomplished without removing or altering a load-bearing structural member unless the load-bearing structural member is otherwise being removed or altered as part of the alteration.

Section 302(b)(2)(B) of the legislation includes policies applicable to fixed route vehicles used by entities that are not in the principal business of transporting people. First, it is considered discrimination for an entity to purchase or lease a bus or a vehicle that is capable of carrying in excess of 16 passengers, for which solicitations are made later than 30 days after the effective date of this Act that are not readily accessible to and usable by individuals with disabilities except that over-the-road buses shall be subject to section 304(b)(4) (which delays the effective date for 6 years for small operators and 5 years for other operators) and section 305 (which provides for a study of how to make the impact of making such buses accessible).

If an entity not in the principal business of transporting people purchases or leases a vehicle carrying 16 or fewer passengers after the effective date of title III that is not readily accessible to or usable by individuals with disabilities, it is discriminatory for such an entity to fail to operate a system that, when viewed in its entirety, ensures a level of service to

individuals with disabilities equivalent to the level of service provided to the general public.

Section 302(b)(2)(C) includes provisions applicable to vehicles used in demand-responsive systems by entities that are not in the principal business of transporting people. The provisions applicable to such vehicles are the same as those applicable to fixed route vehicles except that the entity need not ensure that all new vehicles carrying more than 16 passengers are accessible if it can demonstrate that the system, when viewed in its entirety, already provides a level of service to individuals with disabilities equivalent to that provided to the general public.

For example, where a hotel at an airport provides free shuttle service, the hotel need not purchase new vehicles that are accessible so long as it makes alternative equivalent arrangements for transporting people with disabilities who cannot ride the inaccessible vehicles. This might be accomplished through the use of a portable lift or by making arrangements with another entity that has an accessible vehicle that can be made available to provide equivalent shuttle service.

New construction

Section 303 of the legislation sets forth obligations with respect to the construction of new facilities. This section is applicable to public accommodations and potential places of employment.

[69] The term "potential places of employment" is defined in section 301(2) to mean facilities that are intended for nonresidential use and whose operations affect commerce. The Committee expects that implementing regulations concerning "potential places of employment" will cover the same areas in a facility as existing design standards. Thus, unusual spaces that are not duty stations, such as catwalks and

fan rooms, would continue to lie outside the scope of design standards.

The term does not include facilities that are covered or expressly exempted from coverage under the Fair Housing Act of 1968.

Specifically, section 303(a) of the legislation specifies that it is unlawful discrimination for a public accommodation or potential place of employment to fail to design and construct facilities for first occupancy later than 30 months after the date of enactment of this Act that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impacticable to do so, in accordance with standards set forth or incorporated by reference in regulations issued under title III.

Section 303(b) of the legislation exempts entities from installing elevators under the same circumstances applicable to alterations (see section 302(b)(2)(A)(vi) and the accompanying clarifications in the report).

The phrase "readily accessible to or usable by" is a term of art which, in slightly varied formulations, has been applied in the Architectural Barriers Act of 1968 ("ready access to, and use of"), the Fair Housing Act of 1968, as amended ("readily accessible to and usable by"), and the regulations implementing section 504 of the Rehabilitation Act of 1973 ("readily accessible to and usable by") and is included in standards used by Federal agencies and private industry e.g., the Uniform Federal Accessibility Standards (UFAS) ("ready access to and use on and the American National Standard for Buildings and Facilities–Providing Accessibility and Usability for Physically Handicapped People (ANSI A117.1) (readily accessible to, and usable by).

The term is intended to enable people with disabilities (including mobility, sensory, and cognitive impairments) to get to, enter, and use a facility. While the term does not

necessarily require the accessibility of every part of every area of a facility, the term contemplates a high degree of convenient accessibility, entailing accessibility or parking areas, accessible routes to and from the facility, accessible entrances, usable bathrooms and water fountains, accessibility of public and common use areas, and access to the goods, services, programs, facilities, and accommodations offered at the facility.

The term is not intended to require that all parking spaces, bathrooms, stalls within bathrooms, etc. are accessible; only a reasonable number must be accessible, depending on such factors as their location and number.

Accessibility elements for each particular type of facility should assure both ready access to the facility and usability of its features and equipment and of the goods, services, and programs available therein.

[70] For example, for a hotel "readily accessible to and usable by" includes, but is not limited to, providing full access to the public use and common use portions of the hotel; requiring all doors and doorways designed to allow passage into and within all hotel rooms and bathrooms to be sufficiently wide to allow passage by individuals who use wheelchairs; making a percentage of each class of hotel rooms fully accessible (e.g., including grab bars in bath and at the toilet, accessible counters in bathrooms); audio loops in meeting areas; signage, emergency flashing lights or alarms; braille or raised letter words and numbers on elevators; and handrails on stairs and ramps.

Of course, if a person with a disability needing a fully accessible room makes an advance registration without informing the hotel of the need for such a room arrives on the date of the reservation and no fully accessible room is available, the hote has not violated the Act. Moreover, a hotel in not required to forego renting fully accessible rooms to

nondisabled persons if to do so would cause the hotel to lose a rental.

In a physician's office, "readily accessible to and usable by" would include ready access to the waiting areas, a bathroom, and a percentage of the examining rooms.

Historically, particularized guidance and specifications regarding the meaning of the phrase "readily accessible to and usable by" for various type of facilities have been provided by MGRAD, UFAS, and the ANSI standards. Under this legislation, such specificity will be provided by the expanded MGRAD standards to be issued by the Architectural and Transportation Barriers Compliance Board and by the regulations issued by the Attorney General, both of which are discussed subsequently in this report.

It is the expectation of the Committee that the regulations issued by the executive branch could utilize appropriate portions of MGRAD.

It is also the Committee's intent that the regulations will include language providing that departures from particular technical and scoping requirements, as revised, will be permitted so long as the alternative methods used will provide substantially equivalent or greater access to and utilization of the facility. Allowing these departures will provide covered entities with necessary flexibility to design for special circumstances and will facilitate the application of new technologies.

The phrase "structurally impracticable" is a narrow exception that will apply only in rare and unusual circumstances where unique characteristics of terrain make accessibility unusually difficult. Such limitations for topographical problems are analogous to an acknowledged limitation in the application of the accessibility requirements or the Fair Housing Amendments Act of 1988. In the House Committee Report accompanying the Act, the House Committee on the Judiciary noted:

> certain natural terrain may pose unique building problems. For example, in areas which flood frequently, such as waterfronts or marshlands, housing traditionally may be built on stilts. The Committee does not intend to require that the accessibility requirements of this Act over[71]ride the need to protect the physical integrity or multifamily housing that may be built on such sites.

By incorporating the phrase "structurally impracticable," the ADA explicitly recognizes an exception analogous to the "physical integrity" exception for peculiarities of terrain recognized implicitly in statutory language and expressly in the House Committee Report accompanying the Fair Housing Amendments Act. As under the Fair Housing Amendments Act, this in intended to be a narrow exception to the requirement of accessibility. It means that only where unique characteristics of terrain prevent the incorporation of accessibility features and would destroy the physical integrity of a facility is it acceptable to deviate from accessibility requirements. Buildings that must be built on stilts because of their location in marshlands or over water are one of the few situations in which the structurally impracticable exception would apply.

Neither under the ADA nor the Fair Housing Amendments Act should an exception to accessibility requirements be applied to situations in which a facility is located in "hilly" terrain or on a plot of land upon which there are steep grades; in such circumstances, accessibility can be achieved without destroying the physical integrity of a structure, and ought to be required in the construction of new facilities.

In those are circumstances in which it is structurally impracticable to achieve full compliance with accessibility

requirements under the ADA, public accommodations should still be designed and constructed to incorporate accessibility features to the extent that they are structurally practicable. The accessibility requirements should not be viewed as an all -or-nothing proposition in such circumstances.

If it is structurally impracticable for a facility in its entirety to be readily accessible to and usable by people with disabilities, then those portions which can be made accessible should be. If a building cannot comply with the full range of accessibility requirements because of structural impracticability, then it should still be required to incorporate those features which are structurally practicable. And if it is structurally impracticable to make a particular facility accessible to persons who have particular types of disabilities, it is still appropriate to require it to be made accessible to persons with other types of disabilities.

If, for example, a facility which is of necessity built on stilts cannot be made accessible to persons who use wheelchairs because it is structurally impracticable to do so, this in no reason not to still require it to be accessible for individuals with vision or hearing impairments or other kinds of disabilities.

The new construction provision includes establishments that "are potential places of employment" as well as public accommodations. The Committee decided to include this provision to ensure that unnecessary barriers to employment are not built into facilities that are constructed in the future. Since it is easy and inexpensive to incorporate accessibility features in new construction, the Committee concluded that there is no rational justification for employers to continue to construct inaccessible facilities that will bar [72] the entrance of and limit opportunities for people with disabilities for years to come.

In addition, this provision will ensure that all new facilities which potentially may be occupied by places of

public accommodation but whose first occupant may not be such an entity are constructed in such a way that they are readily accessible to and usable by individuals with disabilities for the original use for which the building is intended.

The Committee decided not to limit this provision to potential places of employment of 15 or more employees because of the desire to establish a uniform requirement of accessibility in new construction, because of the ease with which such a requirement can be accomplished in the design and construction stages, and because future expansion of a business or sale or lease of the property to a larger employer or to a business that is open to the public is always a possibility.

The phrase "are potential places of employment" is not intended to make an establishment that is not a public accommodation subject to the other provisions of this title e.g., the obligation to provide auxiliary aids or services.

Prohibition of discrimination in public transportation services provided by private entities

Section 304(a) of the legislation specifies that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of public transportation services provided by a privately operated entity that is primarily engaged in the business of transporting people, but is not in the principal business of providing air transportation, and whose operations affect commerce.

The term "public transportation" is defined in section 301(4) of the legislation to mean transportation by bus or rail, or by any other conveyance (other than by air travel) that provides the general public with general or special service (including charter service) on a regular and continuing basis.

The Committee wishes to make it clear that the provisions of title III do not apply to public entities such as public transit authorities and school districts. Public entities providing transportation services are generally subject to the provisions of title II of this legislation and school bus operations are generally covered by regulations implementing section 504 of the Rehabilitation Act of 1973 issued by agencies providing Federal financial assistance to school districts.

The Committee also wishes to make it clear that title III does not apply to volunteer-driven commuter ridership arrangements.

The Committee excluded transportation by air because the Congress recently passed the Air Carriers Access Act, which was designed to address the problem of discrimination by air carriers and it is the Committee's expectation that regulations will be issued that reflect congressional intent.

Section 304(b) of the legislation includes specific applications of the general prohibition set out in section 303(a). As used in subsection (a), the term "discrimination against" includes:

> (1) The imposition or application by an entity of eligibility criteria that screen out or tend to screen out an individual [73] with a disability or any class of individuals with disabilities from fully enjoying the public transportation services provided by the entity;
>
> (2) The failure of an entity to–
>
> (A) make reasonable modifications consistent with those required under section 302(b)(2)(A)(ii);
>
> (B) provide auxiliary aide and services consistent with the requirements of section 302(b)(2)(A)(iii); and
>
> (C) remove barriers consistent with the requirements of section 302(b)(2)(A) (iv), (v), and (vi); and

(3) The purchase or lease of a new vehicle (other than an automobile or over-the-road bus) that is to be used to provide public transportation services, and for which a solicitation is made later than 30 days after the effective date or this Act, that is not readily accessible to and usable by individuals with disabilities, including individuals who use wheelchairs.

The bill includes a special exception for vehicles used in demand-responsive system. In the case of a vehicle used in a demand-response system, the new vehicle need not be readily accessible to and usable by individuals with disabilities if the entity can demonstrate that such system, when viewed in its entirety, provides a level of service to individuals with disabilities equivalent to the level of service provided to the general public.

With respect to the purchase of new over-the-road buses, it is considered discrimination to purchase or lease a new over-the-road bus that is used to provide public transportation services and for which a solicitation is made later than 6 years after the date of enactment of this Act for small providers (as defined by the Secretary of Transportation) and 5 years for other providers, that is not readily accessible to and usable by individuals with disabilities.

The term "readily accessible to and usable by" means, with respect to vehicles used for public transportation, able to be entered into and exited from and safely and effectively used by individuals with disabilities, including individuals who use wheelchairs.

Currently, technology may not exist that will enable an individual who uses a wheelchair to access restrooms in over-the-road buses without resulting in the significant loss of current seating capacity. Since this legislation is future driven, the Committee intends that the Department of Transportation develop regulations which require that

accessible restrooms be installed on intercity coaches when technologically feasible.

Lifts or ramps, and fold-up seats or other wheelchair spaces with appropriate securement devices are among the current features necessary to make transit vehicles readily accessible to and usable by individuals with disabilities. The requirement that a vehicle is to be readily accessible obviously entails that each vehicle is to have some spaces for individuals who use wheelchairs or three-wheeled mobility aids; how many spaces per vehicle are to be made available for wheelchairs is, however, a determination that depends on various factors, including the number of vehicles in the fleet, seat vacancy rates, and usage by people with disabilities

The Committee intends that, consistent with these general factors, the determination of how many spaces must be available should be flexible and generally left up to the provider, provided

* * * * *

Harris
Hatcher
Hawkins
Hayes (IL)
Hertel
Hoagland
Hochbrueckner
Horton
Houghton
Hoyer
Hughes
Jacobs
Johnson (SD)
Jones (GA)
Jones (NC)
Jontz
Kanjorski
Kaptur
Kastenmeier
Kennedy
Kennelly
Kildee
Kleczka
Kolter
Kostmayer
Lantos
Leach (IA)
Lehman (CA)
Lehman (FL)
Levin (MI)
Lewis (GA)
Lloyd
Lowey (NY)
McMillen (MD)
McNutty
Mfume
Miller (CA)
Mineta
Moakley
Mollohan
Moody
Morella
Morrison (CT)
Mrazek
Murtha
Nagle
Natcher
Neal (MA)
Neal (NC)
Nowak
Oakar
Obey
Owens (NY)
Owens (UT)
Pallone
Panetta
Pashayan
Patterson
Payne (NJ)
Pease
Pelosi
Penny
Perkins
Poshard
Rahali
Rangel
Scheuer
Schneider
Schroeder
Schumer
Serrano
Sharp
Shays
Sikorski
Skaggs
Slattery
Slaughter (NY)
Smith (FL)
Smith (VT)
Snowe
Solarz
Spratt
Staggers
Stark
Stokes
Studds
Swift
Synar
Tallon
Taylor
Torres
Torricelli
Towns
Traficant
Traxler
Udall
Unsoeld
Vento
Visclosky

Luken, Thomas	Ravenel	Walgren
Manton	Richardson	Walsh
Markey	Rinaldo	Washington
Martinez	Roe	Waxman
Matsui	Rostenkowski	Weiss
Mavroules	Rowland (CT)	Wheat
Maxzoli	Roybal	Whitten
McCloskey	Russo	Williams
McCurdy	Sabo	Wilson
McDade	Salki	Wise
McDermott	Sangmeister	Wolpe
McGrath	Savage	Wyden
McHugh	Sawyer	Yates

NOT VOTING–13

Alexander	Frenzel	Ros-Lehtinen
Craig	Hammerschmidt	Thomas (CA)
Flippo	Lukens, Donald	Watkins
Ford (TN)	Nelson	
Frank	Oberstar	

□ 1412

The Clerk announced the following pairs:

On this vote:

Mr. Craig for, with Mr. Nelson of Florida against.

Mr. Thomas of California for, with Mr. Oberstar against.

Mr. ACKERMAN changed his vote from "aye" to "no."

Messers. VOLMER, QUILLEN, DAVIS, and SPENCE changed their votes from "no" to "aye."

So the amendment, as modified, was rejected.

The result of the vote was announced as above recorded.

Mr. STAGGERS. Mr. Chairman, during the Judiciary Committee's markup of the Americans With Disabilities Act,

I entered into a colloquy with the distinguished chairman of the Subcommittee on Civil and Constitutional Rights, Mr. EDWARDS, regarding my concern pertaining to the impact of the ADA on the temporary worksite. This concern stemmed from conversations I've had with constituents in the construction industry. They pointed out that making certain types of accommodations on a temporary worksite, such as a construction jobsite, would be very difficult due to the frequently changing circumstances, structure, and terrain of such worksites.

I am pleased to say the Judiciary Committee report language, as well as the Education and Labor Committee report language, discuss the special circumstances of the temporary worksite. Both reports clarify the intent of the ADA, with regard to consideration of the type of operation maintained by the entity, in determining whether or not an accommodation would pose an undue hardship. Specifically, the Judiciary Committee report states an employer on a construction job site, for example, would not be required to made accommodations which would fundamentally alter the nature of the site, or be unduly costly to implement or maintain. Furthermore, the committee recognizes that certain types of accommodations which may be easily made in a more traditional work setting, such as an office building, would impose an undue hardship on the nontraditional, temporary worksite.

The contractors I mentioned came to me because they are not sure what will be expected of them under the employment title (I) of the ADA. They raised the point that a construction job site is an ever-changing place of employment. As a project enters different phases of completion, plans of accessibility change. An accommodation made today won't necessarily provide access tomorrow. In addition, many of the employees are temporary, in that they work for a particular employer only for the duration of that project. Employers on

temporary worksites want assurances that this legislation will take into consideration the realities of their unique industry. I believe the committee report language addresses this situation, and I thank Mr. EDWARDS for his assistance on this important matter.

Certainly, this legislation will benefit the entire nation by prohibiting discrimination against the estimated 43 million persons in this country with disabilities, and I strongly support that intent. However, Mr. Chairman, I think it is important to raise the issues during this debate which have concern to those who will have to comply with the act, particularly small businesses, and point out the steps the committee of jurisdiction have taken to clarify their obligation.

Mr. FISH. Mr. Chairman, as we consider the Americans with Disabilities Act [ADA] today, I would like to offer some comments on six amendments which I introduced and which were accepted by the Judiciary Committee during its consideration of the bill. These provisions have been incorporated into the bill before us. I would like to briefly describe the purpose of each of these amendments, as I believe that will be useful for Members of this body.

Section 101(8): qualified individual with a disability ("Essential function of the job"):

The ADA, like section 504 of the rehabilitation Act, defines "qualified individual with a disability" as an individual with a disability who, with or without reasonable accommodation can perform the essential functions of the job. The term "essentials functions" is included in order to ensure that persons with disabilities are not disqualified because they cannot perform duties which are only marginal to the job. Employees often include tasks in job descriptions which are incidental to the actual job or are performed infrequently or not at all. A common example of this is the requirement that applicants possessed drivers' licenses for non-driving jobs. Such a driving requirement serves to disqualify persons with

disabilities which preclude driving. Employees often include this requirement because of the convenience of having an employee who drives do an occasional errand or because the employer believes that an employee who drives will not be late to work or will be able to work more overtime. These would not be valid reasons to exclude a person whose disability prevented him from driving, if the person was able to do the tasks of the actual job.

In addition, the essential function requirement focuses on the desire result rather than the means of accomplishing it. For example, in one case under the Rehabilitation Act, the employer required each employee to be able to perform the job with both arms. *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981). The plaintiff was unable to do this because his disability resulted in limited mobility in his left arm. The court found that the essential function of the job was the ability to lift and carry mail which the employee had proven that he could do, not the ability to use both arms. Moreover, the court found that the employer was required to adapt the work environment to determine whether the employee with the disability could perform the essential requirements of the job with reasonable adaptations.

Likewise, in a job requiring the use of a computer, the essential function is the ability to access, input, and retrieve information from the computer. It is not essential that the person be able to use the keyboard or visually read the computer screen, if the provision of adaptive equipment or software would enable the person with a disability–for example, impaired vision or limited hand control–to control the computer and access the information. The relevant question would be whether the acquisition of the equipment would be a reasonable accommodation, given the factors to be considered in making that determination.

The committee adopted addition language which states that consideration shall be given to the employer's judgment

as to what functions of the jobs are essential. This amendment was added because of concerns that the essential function provision would be read to mean that the employee alone could define the essential functions and that the employer's judgment would be disregarded. The amendment simply clarifies that the employer's judgment should be considered, along with all other evidence. An amendment which would have created a presumption in favor of the employer's judgment was rejected. Hence, the amendment is neutral as to the weight that should be given to the employer's judgment about which functions are essential. Similarly, an amendment was approved on the floor which states that job descriptions developed by the employer shall be considered evidence of the essential functions of the job. Again, this amendment is neutral as to the weight to be given this evidence. Writing down a job function does not elevate its weight. The weight given to a written job description will depend on how closely it is tailored to the actual functions of the job. Moreover, a plaintiff may use the job description as evidence of discrimination. Hence, both amendments to the essential functions provision should be read to conform to existing law which considers evidence from both the plaintiff and defendant on the issue of essential functions.

Section 103(b)(3): Direct threat to others:

The committee adopted amendments to the employment and public accommodations sections of the bill to ensure that entities which excluded persons with disabilities from their programs on the basis of risk of harm to others did so based on the standard of a direct threat that could be proved to be a significant risk to the health or safety of others that cannot be eliminated with reasonable accommodation.

While the committee does not foresee that the employment or participation of an individual with disabilities would generally pose any risk, much less a significant risk, to the health or safety of others by the status of having a

disability, the committee added this provision to allay the fears of those who believe that the nondiscrimination provisions of the bill could force employers and providers of benefits or services to employ or to interact with those individuals who pose such a risk.

In adopting this standard, the committee drew on case law developed under Section 504 of the Rehabilitation Act of 1973, as amended. Under this case law, a person would not be considered qualified if he or she posed a direct threat to the health or safety of others. The formulation of this standard parallels the provision added to the Civil Rights Restoration Act of 1988 (Public Law 100-259, 102 Stat. 28) and to the provision added to the Fair Housing Amendments Act of 1988 (Public Law 100-403, 102 Stat. 1619). Congress added both provisions in order to codify the Supreme Court decision in *School Board of Nassau County vs. Arline*, 107 S.Ct. 1131, n.16.

Any claim that an individual poses a direct threat and a significant risk of harm to others must be established on the basis of objective evidence. Generalized assumptions, subjective fears and speculation are insufficient to prove the requisite direct threat to others.

If the employer determines, by objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences, that the applicant will pose a direct threat that is a significant risk to the health or safety of others, and that the threat cannot be eliminated by the provision of reasonable accommodation, the employer may reject the applicant as an employee. Providers of public accommodations are intended to be held to the same standards as employers, with regard to denying services or benefits to persons with disabilities.

The applicant or participant is not required to prove that he or she poses no risk. Further, the determination of significant risk for persons with disabilities must be based on

the current condition of the applicant, participant or employee. The decision to exclude it cannot be based on merely an elevated risk of injury. See, *Mantolete v. Bolger*, 736 F.2d 1416 (9th Cir. 1985). This amendment adopted by the committee is intended to set a clear, defined standard which requires actual proof of significant risk to others.

Section 308(a)(1): The futile gesture doctrine:

Another amendment offered and accepted in the Judiciary Committee clarified the language in the title III enforcement provision which states that a person may file a civil action if he or she has reasonable grounds to believe that he or she was about to be subjected to discrimination. Concerns were raised as to the meaning of this provision in cases other than new construction or alterations of buildings. The explicit language describing the futile gesture doctrine was inserted to clarify the circumstances when the "about to be" languages would be applicable. This has been a well-established doctrine in title VII case law and is implied in title I.

Section 302(a): Prohibition of discrimination by public accommodations: General rule:

The committee adopted an amendment which clarifies that the prohibition against discrimination "in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations," applies to "any person who owns, leases (or leases to), or operates a place of public accommodation."

This amendment was added in order to make it clear that the prohibition against discrimination applies to the owner of the building that houses the public accommodation, as well as the owner or operator of the public accommodation itself. For example, an owner of a building that contains retail stores would be required to make readily achievable changes to accomplish access in common areas under the building owner's control. Without this provision, the purpose of title III could be undermined. A person with a disability could be

prevented from entering the public accommodation because of an inaccessible entrance–which could be made accessible easily, without much difficulty or expense–i.e. in a readily achievable manner. Likewise, the owner would be required to modify policies which exclude people with disabilities, such as a no pets rule, in order to allow entrance to a person who uses a guide, signal or service dog. Any actions of the building owner which affect the ability of a person with a disability to use the public accommodation would be covered, to the extent provided in the non-discrimination provision of Section 302.

The amendment also makes it clear that the owner and operator of the public accommodation are prohibited from discriminating in accordance with this title. Corporate headquarters would be covered to the same extent as the operator of the accommodation. For example, corporate headquarters could not continue to design new stores in an inaccessible manner in violation of Section 303.

Finally, organizations which lease public accommodations for events which are open to the public are prohibited from leasing those public accommodations which discriminate against people with disabilities as defined by this title. This provision addresses concerns that were raised about the inability of people with disabilities to attend public events because of lack of access or discriminatory policies. This provision does not require organizations to lease only accessible facilities. It does, however, require organizations to lease facilities which are in compliance with this title. For example, an organization could not lease a conference center for public events which refused to admit blind people who used guide dogs or refused to serve people who used wheelchairs.

Section 303: New construction and alterations in public accommodations and commercial facilities:

The Committee also approved an amendment which extended the obligation to carry out building alterations so that they result in accessibility in commercial facilities, as well as in public accommodations. This amendment was intended to correct an oversight in previous bills where the alterations section only applied to public accommodations. The intent of the ADA is to assure that construction performed in the future results in accessibility and usability by people with disabilities. In order to accommodate the concerns of businesses, a line was drawn between existing buildings where only those accessibility changes which are readily achievable are required, and new construction which must be accessible. In keeping with this purpose, it made sense to require that alterations which affect usability also be accessible in all commercial facilities. The bill does not require that existing buildings be altered for accessibility purposes. It simply requires that if and when alterations are performed that they incorporate accessibility requirements. Without this amendment, the anomalous situation could arise that a new commercial facility which was required to be accessible under the ADA could be altered to make it inaccessible.

Section 309: Examinations and courses:

The committee adopted an amendment which creates an obligation on all entities which provide tests and courses related to applications, licensing, certification or credentialing for secondary or post-secondary education, professional, or trade purposes to offer the examinations or courses in a place and manner that is accessible. This amendment was critical to the purposes of the ADA, to create equal opportunity for persons with disabilities. This purpose would be undermined if people with disabilities would be foreclosed from the same opportunities to prepare and qualify for educational and professional positions. For example, a law school graduate who used a wheelchair would be at a disadvantage if his

classmates could take a bar preparation course that was held in an inaccessible site. Likewise, a person who is blind may be unable to compete in the S.A.T. exam without the assistance of a reader. The courses and examinations covered in this section were considered so critical to the intent of the ADA that the committee wanted to ensure the participation of people with disabilities.

CONCLUSION

In conclusion, the amendments that I offered and that were accepted by the Judiciary Committee are consistent with the purpose of the ADA–to open equal opportunities to people with disabilities. I look forward to the passage of the most historic piece of disability civil rights legislation of our times and feel honored to have had a part in drafting it.

Mr. HAYES of Illinois. Mr. Chairman, I rise in strong support of the Americans with Disabilities Act before us today. Ever since this great country was formed over 200 years ago Americans have had one common goal in life–democracy. After all this time it is a sad commentary that with all of our know how and all the advancements that we have made throughout our history, that we have not been able to achieve that goal for a vast number of citizens.

We have legislated against roadblocks for equal education, equal employment, equal opportunity and equal rights. Still, discrimination persists to eat away at the fabric of our society. One day we will overcome the hatred and bigotry that is harbored by a declining few in this country. Until that time, it is important that we go through the exercise we are involved in today. When enacted, the ADA bill before us will bring much of what society has to offer to those who can least afford to be denied full membership–I am talking about those with mental and physical disabilities.

Given the fact that there are over 43 million Americans suffering from some form of disability, this legislation will have a wide and far reaching impact on the lives of countless citizens. There simply is no excuse why these citizens should not have the full protections accorded everyone else in society.

While I am not so naive as to think this legislation alone will end the discrimination these individuals face each and every day, just as the Civil Rights Act of 1964 and the Rehabilitation Act of 1973 have changed our society for the better, the ADA will also have a profound positive impact on the quality of life of millions of Americans.

I urge my colleagues on both sides of the aisle to vote in support of this bill.

Mr. MORRISON of Connecticut. Mr. Chairman, this is a historic day. Twenty-six years after the enactment of the Civil Rights Act of 1964, which barred discrimination based on race, religion, national origin and gender, we are about to pass legislation that will bar discrimination against one of the nation's largest minority groups–Americans with disabilities.

This bill extends to Americans with disabilities the civil rights that are guaranteed to all Americans. I am delighted that we are moving forward to empower Americans with disabilities, not only so that they may have access to the opportunities so many of us take for granted, but also so that we all may have access to their talents and productivity.

Mr. Chairman, one of the key accomplishments of this bill is the prohibition of discrimination on the basis of public accommodation. With the passage of this bill no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodation of any place of public accommodation.

The mandate provided in the ADA for architectural accessibility will be extremely important, particularly in

States which have no access requirements today. In these places, disabled people and their advocacy organizations have long been frustrated by unsuccessful attempts to achieve access to public accommodations for voluntary efforts by the operators of those accommodations.

One refrain disabled people have heard over and over again is, "Why should we make our building accessible when we have no disabled customers?" This reflects an erroneous assumption. Disabled people tend to not even try to use a public accommodation that is inaccessible; therefore, the manager doesn't know what the demand for services would be among people with disabilities if the facility was accessible.

As society becomes more accessible, and disabled people become more fully integrated, most public accommodations will tend to have disabled customers.

Sometimes, managers of public accommodations don't contemplate use by disabled persons because of the unique physical nature of the public accommodation or the physical requirements for participation. But again, this is based on erroneous assumptions.

For example, at one time, it was unheard of for individuals using wheelchairs to play tennis, and tennis court designers and managers never contemplated disabled players wanting courts. However, wheelchair tennis is now an accepted athletic event, and it can be assumed that tennis courts should be wheelchair accessible.

In general, when participation by disabled persons isn't contemplated at a place or activity, erroneous assumptions about the skills and inclinations of disabled persons are being made. This is why the ADA requires access to all public accommodations.

One of the ADA's public accommodations requirements is that, when buildings are altered, the altered area must be made accessible to people with disabilities. Alterations

include remodeling projects of all kinds. Additions to buildings should be considered alterations.

A related requirements is that an accessible path of travel must be provided to the altered area, if providing one would not be disproportionate in cost and scope to the overall alteration. An accessible path of travel should include whatever elements are necessary so that a disabled person can enter the facility, whether the person arrives by driving a car into the building's parking lot, or whether the person comes up the public sidewalk.

Also, facilities serving the altered area, like accessible restrooms, telephones, and drinking fountains, should be provided if they are not disproportionate in cost and scope to the overall alteration.

The "disproportionate" language in the bill is provided to offer operators of public accommodations relief in the situations where providing an accessible path of travel to an altered area would be so overwhelmingly expensive, in comparison to the originally intended scope of the alteration, that it would make the alteration financially infeasible. In this way, the bill offers a well-crafted requirement for accessibility, and balances it with the necessary financial projections for the operators of commercial establishments covered by the ADA.

For the Americans with Disabilities Act to provide a successful mandate for eliminating disability discrimination, it will be critical for it to be regulated and implemented very carefully. Implementation must take into account the actual problems that face disabled people on a daily basis in our society.

Two examples include hotels and grocery stores, which present special challenges for implementation.

Disabled people are frequently frustrated by the inaccessibility of hotel rooms. Very few rooms, even in new hotels, are made fully accessible. The rest of the rooms often

feature restroom doors too narrow to enter. Often, it has been impossible for disabled persons who need to fly to a city on short notice to do business, to find a usable hotel room. For the same reason, organizations of disabled persons are often stymied when trying to find a hotel for a conference, because virtually all hotels feature too few rooms to accommodate the organizations' disabled members.

For this reason, the ADA requires new hotels to meet a number of requirements. Common-use areas like lobbies and restaurants must be accessible, a few rooms must be fully accessible–including grab bars and wheelchair turning space in the restroom–and audio loops for the use of hearing-impaired persons must be available in meeting rooms. In addition, doors to all guestrooms, and doors to the restrooms in all guestrooms, must be of a standard wheelchair-accessible width.

This is a reasonable way to solve the problem. While it might not be reasonable to propose that every guestroom in a new hotel be fully accessible–including restroom grab bars and turning space–it is reasonable to require a percentage of fully accessible rooms and simply the appropriate door widths in the other rooms. Then, many wheelchair users and other people with physical disabilities will be able to use those guestrooms which are not fully accessible. It will be much easier for disabled persons to book usable rooms when they don't have a lot of time in advance, and also will greatly relieve the difficulties of organizations of disabled persons finding hotels to accommodate large groups.

Grocery stores present similar frustrations and sometimes complete discrimination. One practice which renders many grocery stores completely inaccessible is the placing of pole barriers around the entrance to the store in order to prohibit the removal of grocery carts. This practice is also found in other kinds of stores where carts are used This will be illegal

under the ADA; there must be at least one entry/exitway with a standard wheelchair-accessible width.

Also, in new grocery stores, supermarkets, convenience stores, and other stores with checkout stands, checkout stands should permit passage by wheelchairs through the customer pathway. This is not a new idea; but rather is the existing policy in Connecticut, California, and several other States.

It is not sufficient to provide only one accessible checkout stand per store. This practice has been shown ineffective in many existing locations, for two reasons. First, at various times of the day, some checkout stands are not in use. Often, this includes the accessible stand. Many times, disabled persons go to leave the store, only to discover that the only accessible checkout stand has a chain across it, with a sign saying "Please use another checkout stand."

Second, different checkout stands can have different functions. For example, some are express lines–"10 items or less" or similar rule–while others are not. Requiring all checkout stands to be accessible is not burdensome and achieves the necessary degree of accessibility.

Under the Americans with Disabilities Act, when facilities are altered, the altered area must be made accessible, and a path of travel and restrooms serving the altered area must also be made accessible, if not disproportionate in cost and scope to the overall alteration.

It is also important to note that, if the aggregate cost of an accessible path of travel, restrooms, telephones, and drinking fountains would be disproportionate to the overall alteration cost, the operator of the public accommodation is not relieved of the obligation to provide a subset of such features up to the point which would become disproportionate. The goal is to provide the maximum amount of accessibility that doesn't exceed the disproportionality limit.

If a selection must be made between accessibility features, those which provide the greatest use of the facility

should be selected. For example, an accessible entrance would generally be the most important path of travel feature, since without it, the facility would be totally unusable by many persons with disabilities. An accessible restroom would have greater priority than an accessible drinking fountain.

One very important requirement of public accommodations under the ADA is the requirement to make reasonable accommodations in policies, practices, and procedures to afford services to disabled individuals, and to provide services through alternative methods if the removal of architectural and communication barriers in existing facilities is not readily achievable. This is a mandate for common sense. Logical changes which would enhance participation by people with disabilities are required, which sometimes will demand some ingenuity, but will rarely if ever be burdensome on the business operator.

For example, if a pizza parlor is on the second floor of a building with no elevator, an employee must be willing to bring a disabled persons' phoned-in order to them at the bottom of the steps. In a store, a salesperson must be made available for a reasonable length of time to assist a blind person in reading labels of items for sale.

In a movie theater, if some screens are upstairs and some are downstairs, movies should be rotated periodically so disabled patrons can see all the available films, even if they can't climb the stairs. And these rotations must be advertised so that the public knows what they can see when. In an elevator, if the buttons are too high and it would not be readily achievable to lower them, a wand or other device should be provided with which disabled persons can operate the elevator controls.

In an existing two-story restaurant which has no public elevator, but does have a freight elevator, if disabled persons who can't climb stairs wish to go to the second floor and wish

to use the freight elevator, it must be made available to them, even if normal policy prohibits the public from such use.

Mr. McDERMOTT. Mr. Chairman, I rise in support of the Americans with Disabilities Act. This legislation represents the first comprehensive piece of civil rights legislation for people with disabilities–extending necessary protections that have long been denied to such individuals.

I am particularly pleased that this act will finally also extend necessary protection to people with HIV disease. These are individuals who have any condition along the full spectrum of HIV infection–asymptomatic HIV infection, symptomatic HIV infection or full-blown AIDS. These individuals are covered under the first prong of the definition of disability in the ADA, as individuals who have a physical impairment that substantially limits a major life activity. As a physician, I know that although the major life activity that is affected at any point along the spectrum by the HIV infection may be different, an effect on some major life activity exists from the time of HIV infection.

As a physician, I also know all too well that we need to be in a fight against a disease, not in a fight against people with a disease. But, unfortunately, while much of America has responded with compassion and dignity to individuals with HIV disease, many others have not. For those individuals who still experienced discrimination on the part of those who react out of ignorance and fear, the ADA will finally extend critical protection in the areas of employment, transportation and public accommodations.

In employment, the protections that exist in all aspects of employment decision-making, and with regard to the provision of reasonable accommodations, will be critical for people with HIV disease. The requirements regarding medical examinations are thoughtful, comprehensive, and will provide necessary protection. Finally, the protections regarding fringe benefits will be important for people with

HIV disease. And, in public accommodations, the protections of the act will ensure that people with HIV disease receive necessary goods and services.

I am pleased that Congress is finally taking this historic step to extend protection to all people with disabilities–including people with HIV disease. I urge my colleagues to join me in voting for this important piece of legislation.

Mr. FAZIO. Mr. Speaker, I strongly support H.R. 2273, the Americans with Disabilities Act. It is long-overdue legislation, which will prohibit discrimination against Americans with disabilities in employment, public accommodations, transportation, and telecommunications.

The Civil Rights Act of 1964 barred discrimination on the basis of race, sex, color, religion, and national origin. Unfortunately, it does not address the very real problem of discrimination on the basis of disability. Every day, millions of disabled Americans face discrimination based solely on their disability, and have no recourse or remedy against those who are discriminating against them.

H.R. 2273 is a fair bill which was carefully drafted to take into consideration concerns from both sides. While it includes provisions to ensure that individuals with disabilities receive the rights and protections they deserve, it also makes certain that businesses will not be required to make unreasonable and excessive changes.

The time for passage of this legislation is long overdue. The 43 million Americans who are physically or mentally disabled have been treated as second class citizens for too long. This measure provides us with the opportunity to guarantee to those individuals with disabilities, the same broad-based protection against discrimination that all Americans enjoy. I urge my colleagues to support this legislation.

Mr. VENTO. Mr. Chairman, I rise in support of H.R. 4807, the "Americans with Disabilities Act of 1990."

Mr. Chairman, the committee of the whole adopted an amendment to section 507 of the bill that addresses the question of the right of disabled persons to enter wilderness areas by the use of wheelchairs.

Because there may be unresolved questions, I believe that it would be useful to clarify the current State of agency policies regarding this subject.

Central features of wilderness areas are their roadless character and the opportunities they afford for recreation that does not involve use of motorized devices such as motorcycles or all-terrain vehicles. Apparently, this has led some to believe that wheelchairs, too, are precluded even when their use is a medical necessity.

In the past, slight differences and regulations of the agencies managing wilderness areas may have added to the impression of some that such use was not permitted. The National Park Service and the Forest Service today have policy statements that specifically authorize the use of wheelchairs by mobility-impaired persons in wilderness areas. The National Park Service policy is spelled out in Chapter 6, section 8 of the NPS Management Policies, while the Forest Service's 1986 manual included an exemption of "wheelchairs when used as necessary medical appliances" from the general restrictions on motorized transport in wilderness areas, but in the past the regulations of the Bureau of Land Management [BLM] have been silent on wheelchair access to wilderness.

However, according to BLM director Jamison, last year the BLM adopted an explicit policy confirming that wheelchair use in wilderness is permitted and BLM and is revising its existing management regulations for wilderness areas to include language specifying that the use of wheelchairs by persons with mobility impairments is not considered as being use of mechanical transport or motorized equipment within the intent of those regulations.

Any lingering doubts about how the agencies view this matter should soon be removed, especially since the Forest Service has drafted new language for its manual that will even more clearly reflect the permissibility of wheelchair use.

Thus, Mr. Speaker, as a matter of record it has been clear for some time but there is no need to amend the Wilderness Act to accommodate wheelchair access. The agencies have correctly concluded that the Act does not prohibit use of wheelchairs in wilderness areas when such use is necessary because of a person's medical condition or disability.

For the further information of members, I am here including a May 17, 1990, memorandum by the Congressional Research Service concerning the Forest Service's new manual language, a copy of letter from BLM Director Cy Jamison to Representative RHODES, a member of the Committee on Interior and Insular Affairs, concerning that agency's revisions of its regulations, and a copy of the relevant portion of the National Park Service Management Policies.

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, May 17, 1990.

To: House Committee on Interior and Insular Affairs, Subcommittee on National Parks and Public Lands, Attention: Stan Sloss.

From: Betsy A. Cody, Analyst in Natural Resource Policy, Environment and Natural Resources Policy Division.

Subject: Wheelchair Access in Wilderness Areas.

Attached is a copy of the U.S. Forest Service's definition of "mechanical transport" as it appears in the agency's 1986 manual describing management policies. As you will note, the Forest Service definition "does not include wheelchairs when used as necessary medical appliances" (Title 2320.5).

Additionally, the Forest Services has drafted new language for its manual:

* * * mechanical apparatus that is medically necessary for basic mobility of any individual is considered to be part of that person and not subject to restrictions on mechanical transport.[1]

The above represents the Forest Service's current policy on wheelchair access in wilderness areas. As far as I know, this lan-

* * * * *

[1] Conversation with Denise McCraig, Recreation Management Staff, U.S. Forest Service, May 17, 1990.

Supreme Court, U.S.
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No. 98-757

In the Supreme Court of the United States

OCTOBER TERM, 1998

DAYS INNS OF AMERICA, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Section 302 of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12182, prohibits discrimination on the basis of disability in the enjoyment of any "place of public accommodation," and requires those who own, lease, or operate such public accommodations to ensure that they meet certain non-discrimination requirements. Section 303 of the ADA, 42 U.S.C. 12183, makes unlawful (among other things) the "failure to design and construct" new public accomodations and commercial facilities that meet certain accessibility requirements, but does not identify the persons responsible for compliance. The question presented is:

Whether the obligations imposed by Section 303 of the ADA, 42 U.S.C. 12183, extend to persons or entities other than those responsible for complying with Section 302 of the ADA, 42 U.S.C. 12182(a).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B1-B10) is reported at 151 F.3d 822. The opinion of the district court (Pet. App. C1-C16) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 6, 1998. The petition for a writ of certiorari was filed on November 4, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the interrelationship between two sections of Title III of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. 12181-12189 (1994 & Supp. II 1996) (Title III). Section 302 of the ADA,

42 U.S.C. 12182, prohibits disability-based discrimination in "public accommodations," a term that is defined to include (among other things) any inn, hotel, motel, restaurant, theater, auditorium, health spa, station, museum, or park affecting commerce. 42 U.S.C. 12181(7). Section 302(a) provides the general rule against such discrimination:

> No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.

42 U.S.C. 12182(a). Section 302(b), in turn, clarifies the scope of Section 302(a), and sets forth types of discrimination that are encompassed within Section 302(a)'s general prohibition. 42 U.S.C. 12182(b). For example, Section 302(b) clarifies that denying participation to individuals with disabilities, providing them inferior participation, unnecessarily separating them, or failing to make certain reasonable accommodations for them are all unlawful. 42 U.S.C. 12182(b)(1)(A)(i)-(iii) and (2)(A)(ii)-(iv). Section 302(b) further specifies that failure to undertake certain corrective measures for existing public accommodations is unlawful; the failure to remove "architectural barriers * * * in existing facilities," for example, is deemed to be unlawful if "such removal is readily achievable." 42 U.S.C. 12182(b)(2)(A)(iv).

While Section 302 of the ADA applies to all "public accommodations," Section 303 of the ADA, 42 U.S.C. 12183, is a special provision that applies only to newly constructed or newly altered "public accommodations,"

as well as to newly constructed or newly altered "commercial facilities" (which are not otherwise covered by Section 302). Section 303(a) provides, in relevant part:

> [A]s applied to public accommodations and commercial facilities, discrimination for purposes of section 12182(a) of this title [Section 302(a) of the ADA] includes —
>
> (1) a failure to design and construct facilities for first occupancy later than [January 26, 1993], that are readily accessible to and usable by individuals with disabilities, except where an entity can demonstrate that it is structurally impracticable to meet the requirements of such subsection in accordance with standards set forth or incorporated by reference in regulations issued under this subchapter.

42 U.S.C. 12183(a). The "standards" Section 303 refers to are the Standards For Accessible Design (28 C.F.R. Pt. 36, App. A), issued by the Attorney General pursuant to 42 U.S.C. 12186(b).

The "commercial facilities" covered by Section 303 include a broader range of facilities than the "public accommodations" covered by Section 302. In particular, the term "commercial facilities" includes all facilities (built for first occupancy after January 26, 1993) "that are intended for nonresidential use" and "whose operations will affect commerce." 42 U.S.C. 12181(2). Congress understood that many "commercial facilities" that are covered by Section 303 would not have qualified as "public accommodations." See H.R. Rep. No. 485, pt. 2, 101st Cong., 2d Sess. 116 (1990); H.R. Rep. No. 485, pt. 3, 101st Cong., 2d Sess. 53 (1990). For example, factories, warehouses, and many office build-

ings that qualify as "commercial facilities" might not qualify as "public accommodations." 28 C.F.R. Pt. 36, App. B, § 36.104. See H.R. Rep. No. 485, pt. 2, *supra*, at 117; H.R. Rep. No. 485, pt. 3, *supra*, at 53. Unlike Section 302, Section 303 does not specify the persons or institutions that are responsible for complying with its mandate.

2. Petitioners are the franchisors of the Days Inn hotel chain. In 1992, Richard and Karla Hauk entered into a franchise agreement with petitioners to open a new Days Inn hotel in Wall, South Dakota (the Wall Days Inn). Pet. App. B1-B3. Because the hotel was designed and constructed for first occupancy after January 26, 1993, it is subject to the new construction requirements of Section 303(a) of the ADA. Pet. 3; 42 U.S.C. 12183(a).

The franchise agreement required the Wall Days Inn to comply with petitioners' detailed design and construction standards. Pet. App. B3. The agreement also mandated that the hotel be built and maintained in compliance with the ADA, and authorized petitioners to terminate the franchise if the hotel failed to meet the requirements of the ADA. *Id.* at B3, B8. Petitioners had authority under the franchise agreement to review all architectural plans for the Wall Days Inn and to deny the hotel entry into the Days Inn system if it failed to comply with petitioners' design and construction standards. The franchise agreement also gave petitioners the authority to inspect the hotel, both during construction and after it opened for business, to ensure that it met their design and construction standards. *Ibid.*

The Wall Days Inn hotel, as both designed and built, violated ADA accessibility standards and petitioners' own design and construction standards. Petitioners,

however, did nothing during the design or the construction phase to cause the building to be brought into compliance with the ADA, and they allowed it to open as part of the Days Inn system despite its failure to meet the ADA's requirements. Pet. App. B4, C4.

3. The United States filed suit under Section 303(a) of the ADA against petitioners, as well as against the Hauks, the architectural firm that helped design the hotel, and the general contractor for the facility. Pet. App. B1-B2, C1-C2. The complaint alleged that the defendants violated Section 303 by "fail[ing] to design and construct" the new hotel to be readily accessible to and usable by persons with disabilities, 42 U.S.C. 12183(a). See Pet. App. B2. The district court entered consent decrees resolving the United States' claims against all defendants except petitioners. Pet. App. C2.

With respect to petitioners, the district court granted summary judgment against the United States. Petitioners, the court concluded, did not design or construct the Wall Days Inn for purposes of Section 303(a); nor were they the operators of the hotel. Pet. App. C8-C16. The court declined to decide whether Section 303's coverage is, like Section 302's, limited to owners, lessors, lessees and operators. See *id.* at C8-C10.

4. The court of appeals reversed the grant of summary judgment and remanded the case for further proceedings. Pet. App. B1-B10.

a. The court of appeals first rejected petitioners' construction of Section 303(a). Relying on Section 302(a) of the ADA, which prohibits discrimination on account of disability "by any person *who owns, leases (or leases to), or operates* a place of public accommodation," 42 U.S.C. 12182(a) (emphasis added), petitioners argued that liability for violations of Section 303(a) also

should be limited to owners, lessors, lessees and operators. Pet. App. B4-B6. That interpretation, the court explained, is inconsistent with the fact that the limitation to owners, lessors, lessees and operators does not appear in Section 303(a); it appears only in Section 302(a). Pet. App. B5. Moreover, since Section 302(a) by its terms applies only to owners, lessors, lessees and operators of "public accommodations," that reading "renders meaningless section 303's inclusion of commercial facilities," thus creating "an inexplicable gap in coverage of buildings that Congress clearly intended to include." *Id.* at B6. For commercial facilities that do not qualify as public accommodations, the court explained, there is no party who meets this description and thus "no entity liable for violations of the new construction accessibility standards for buildings which are commercial facilities only." *Id.* at B5-B6.

The court of appeals also rejected petitioners' proposed solution to this gap in coverage. The court noted that petitioners had advocated limiting the permissible defendants under Section 303 to owners, lessors, lessees and operators of public accommodations *or commercial facilities*. Pet. App. B6. But the court emphasized that such a reading does not comport with the plain language of Section 302(a), which expressly covers only a party "who owns, leases (or leases to), or operates a place of public accommodation," 42 U.S.C. 12182(a). See Pet. App. B6.

b. Having rejected petitioners' construction of the statute, the court of appeals concluded that, because Section 303 makes "failure to design and construct" properly accessible facilities unlawful, it is most natural to read Section 303 as applicable to anyone who, with requisite control and knowledge, violates the ADA by failing to "design and construct" facilities that meet the

ADA's accessibility requirements, whether or not they are the owner, operator, lessor, or lessee. A franchisor with significant authority to control the design and construction of a new facility, the court of appeals continued, might (depending on the facts) be held liable for failure to "design and construct" a properly accessible facility. Pet. App. B7-B8. In particular, the court of appeals held that a franchisor with significant control and authority over design and construction (but that did not exercise that control or authority) could be liable for violating the ADA, but only if it had actual knowledge of the violation. *Id.* at B9. In this case, the record was sufficient to show that petitioners had substantial control and authority over the design and construction of the Wall Days Inn. It did not, however, reveal whether petitioners had actual knowledge of the accessibility problems at the hotel. Accordingly, the court of appeals remanded the matter to the district court for further proceedings. *Id.* at B8-B10.

ARGUMENT

Petitioners argue that the court of appeals erred in holding that the parties responsible for complying with Section 303 of the ADA are not limited to the owners, operators, lessees and lessors covered by Section 302 of the ADA. Review of this issue by the Court would be premature at the present time, and in any event the decision of the court of appeals is correct.

1. As an initial matter, the Eighth Circuit is the only court of appeals that has addressed whether Section 303's coverage is limited to owners, operators, lessors or lessees of new facilities.[1] Petitioners acknowledge

[1] Two other courts of appeals may consider the issue in the future in cases brought by the United States against Days Inns of America, each of which rests on distinctive factual allegations that

that this case does not present an inter-circuit conflict (Pet. 8), and they do not contend that the court of appeals' holding conflicts with any decision of this Court. Given the relative novelty of the question petitioners raise, and the absence of any other court of appeals decision addressing it, review by this Court would be premature.

2. Moreover, the interlocutory nature of the court of appeals' decision also counsels against further review at this time. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying petition for certiorari because court of appeals had remanded the case and it was thus not ripe for review); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("except in extraordinary cases," review on certiorari is reserved for final judgments); see also *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of certiorari). The court of appeals did not hold that petitioners were liable under Section 303 of the ADA. Instead, it remanded to the district court for further proceedings, specifying that petitioners cannot be held responsible unless they had "actual knowledge" of the accessibility problems at the Wall Days Inn. Pet. App. B8-B10. As a result, petitioners may prevail on remand, rendering their current contentions academic; and if petitioners do not prevail on remand, they can appeal the final judgment, which

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may be relevant to the issue. In *United States* v. *Days Inns of America*, No. 98-15433 (9th Cir.), the parties have filed briefs but argument has not yet been scheduled; moreover, other issues in the case may obviate the need to address the question. In *United States* v. *Days Inns of America*, No. 98-6610 (6th Cir.), the parties have not yet filed briefs.

would then be subject to review with the benefit of a complete record.

3. In any event, the court of appeals' decision is correct, and the interpretation urged by petitioners is inconsistent with the text and history of the statute.

Section 303 by its own terms does not expressly limit the class of actors to which its prohibitions extend. Instead, Section 303(a) broadly provides that, with respect to both public accommodations and commercial facilities, the "failure to design and construct facilities for first occupancy later than [January 26, 1993], that are readily accessible to and usable by individuals with disabilities" violates the ADA. 42 U.S.C. 12183(a). Because there is no express limitation on the persons who may be held liable for violating Section 303(a), Section 303(a) is most naturally read as applying to anyone who engages in the prohibited conduct, *i.e.*, anyone who, with the requisite interest, authority and control, fails to "design and construct" public accommodations or commercial facilities that meet the ADA's accessibility requirements. Here, the court of appeals concluded that a franchisor that has substantial control and authority over design and construction, and that has actual knowledge that the facility violates the ADA, is a sufficient participant in the "design" and "construction" of that facility to be liable for failure to meet the requirements of the ADA. Pet. App. B8-B9.

Petitioners argue that Section 303 must be read as incorporating the same list of potential defendants set forth in Section 302(a), *i.e.*, "any person who owns, leases (or leases to), or operates a place of public accommodation." See Pet. 10 (arguing that Section 303's reference to Section 302 "makes clear that the prohibitions * * * apply to the same persons as do [the prohibitions] of Section 302"). In this case, peti-

tioners contend, they did not own, lease, or operate the hotel.[2] Petitioners' argument, however, cannot be squared with the fact that Section 303 differs from Section 302 in two critical respects: first, it imposes with respect to newly constructed facilities a different kind of responsibility—for design and construction—not applicable to facilities covered by Section 302 alone; and second, with respect to newly constructed facilities, it extends the reach of the statute to cover "commercial facilities" that would not constitute "places of public accommodation" covered by Section 302. Nor can it be squared with the legislative history of those two provisions. All of these factors counsel against wholesale importation of the list of responsible persons from Section 302 into Section 303.

a. First, petitioners' argument ignores the fact that Sections 302 and 303 address different subject matters. Section 302 is directed to a wide range of potentially discriminatory practices at public accommodations, such as improper segregation of the disabled, provision of inferior facilities, and failure to remove unnecessary and easily-removed architectural obstacles. 42 U.S.C. 12182(b)(1)(A)(i)-(iii) and (2)(A)(ii)-(iv). Liability for

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[2] Petitioners do not in their petition dispute that, *if* Section 303 is not limited to owners, lessors, lessees and operators, *then* a person with substantial control and authority over design and construction, who is aware of the ADA violation, is properly held liable therefor. The International Franchise Association (IFC), as Amicus Curiae, does appear to question that holding, at least insofar as the party with control, authority and knowledge is a franchisor. See International Franchise Ass'n Amicus Br. 5-12. IFC, however, identifies no circuit conflict on the extent of participation necessary to make a party liable, and review of such a fact-intensive question would in any event best be addressed in a case that has a full record.

such practices most logically falls on those who control and engage in them, namely the owners, lessors, lessees, and operators of the public accommodation. Section 303, in contrast, is not directed at practices occurring at pre-existing public accommodations. Instead, it is addressed to the failure to design and construct new and newly-altered facilities that meet ADA accessibility requirements. Responsibility for the failure to design and construct ADA compliant facilities most logically falls on those with significant control over those activities, whether or not they own, lease, or operate the facility themselves.

Moreover, Section 302 addresses public accommodations built before the ADA was passed. It would have made little sense (and perhaps would have been somewhat unfair) to hold the original designers and constructors of pre-existing accommodations responsible for bringing them into compliance with that 1990 law. See, *e.g.*, 42 U.S.C. 12182(b)(2)(A)(iv) (requiring removal of architectural barriers to access where feasible). Such an approach, for example, would require a company that designed and built a public accommodation such as a private museum in 1890 to bring the facility into compliance with the ADA in the 1990s, even though the company that built the facility parted with it decades earlier. Accordingly, Congress placed the burden of bringing existing public accommodations into compliance with the ADA not on their builders and designers but rather on those who currently benefit from them, *i.e.*, those who currently own, lease, or operate them. Unlike Section 302, however, Section 303 addresses *new* construction of commercial facilities and public accommodations for first use 30 months *after* the ADA was passed. It is neither awkward nor unfair to hold those with significant control over the design and

construction of public accommodations and commercial facilities after the ADA's passage liable when their design and construction violates the ADA's clearly articulated accessibility requirements. To the contrary, imposing liability on the very people who commit the prohibited act—here, those who fail to design and build properly accessible facilities—is the most logical way of ensuring compliance.

b. Second, petitioners' proposal to incorporate into Section 303 the list of potentially liable parties from Section 302 would effectively nullify Congress's express effort to bring "commercial facilities" within Section 303's scope. Unlike Section 302, which applies to "place[s] of public accommodation," Section 303 extends both to "public accommodations" and "commercial facilities." Petitioners' proposal to limit those responsible for complying with Section 303 to the potential defendants listed in Section 302 would have the effect of reading the words "commercial facilities" out of Section 303, because Section 302 imposes liability only on "any person who owns, leases (or leases to), or operates a place of *public accommodation*," 42 U.S.C. 12182(a) (emphasis added), and makes no mention of owners, lessors, lessees, and operators of "commercial facilities." As the court of appeals explained, "[t]he practical application of [petitioners'] interpretation would leave no entity liable for violations of the new construction accessibility standards for buildings which are commercial facilities" and not public accommodations, thereby creating "an inexplicable gap in coverage of buildings that Congress clearly intended to include." Pet. App. B5-B6. The resulting nullification of the term "commercial facilities" in Section 303 would contravene "the 'elementary canon of construction that a statute should be interpreted so as not to render one part

inoperative.'" *Department of Revenue* v. *ACF Indus.*, 510 U.S. 332, 340-341 (1994) (citation omitted).

Petitioners argue that nullification of the term "commercial facilities" can be avoided by reading Section 303's reference to Section 302 as limiting the permissible defendants under Section 303 to owners, lessors, lessees and operators of public accommodations *or commercial facilities*. That reading, however, conflicts with the plain language of both Sections: It is inconsistent with the text of Section 303, which contains no express limit on the responsible parties whatsoever, and irreconcilable with the text of Section 302, which limits its coverage to owners, lessors, lessees and operators "of any place of public accommodation," 42 U.S.C. 12182(a). In effect, petitioners' proposed solution is to judicially amend the language of Section 302 (in the context of Section 303 actions) to include the phrase "or commercial facilities." But, as the court of appeals correctly recognized, such a rewriting of Section 302 "violates the maxim of statutory interpretation that courts should give effect to the plain language of the statute." Pet. App. B6. More than once this Court has recognized that federal courts are under a "duty to refrain from reading a phrase into the statute when Congress has left it out." *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993); *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

c. Contrary to petitioners' contention (Pet. 13-14), the court of appeals' interpretation gives full effect to Section 303's cross-reference to Section 302(a). Section 303's reference to Section 302(a) makes it clear that the failure to design and construct commercial facilities and public accommodations that meet accessibility requirements is a type of "discriminat[ion] * * * on the basis of disability," 42 U.S.C. 12182(a), prohibited by the

ADA. There is no suggestion that Section 303's reference to Section 302(a) was intended to incorporate into Section 303 any or all of the limits on the persons who may be liable under Section 302(a).

To the contrary, the evolution of Sections 302 and 303 confirm that no such limit was intended. The provision that became Section 303 was originally a subsection of the general prohibition against discrimination now contained in Section 302(a), Pet. 17-18, at a time when that general prohibition did not include any language limiting its application to owners, operators, lessors and lessees. See S. 933, 101st Cong. § 402(a) and (b)(6) (May 9, 1989); H.R. 2273, 101st Cong. § 402(a) and (b)(6) (May 9, 1989). Congress then placed the provision relating to new construction and alterations in a separate section of the statute, and labeled it Section 303. See S. 933, 101st Cong. §§ 302, 303 (Oct. 16, 1989). But even then Section 303's cross-reference to Section 302 could not have been thought to incorporate a limit on the persons who could be liable under Section 303, as Section 302 at that time (like Section 303 today) still contained no such limit. *Ibid.* Finally, when Congress did add a limit on those who could be held liable months later, it added that limit only to Section 302, and did not add it to Section 303. See H.R. Rep. No. 485, pt. 3, *supra*, at 11; H.R. Rep. No. 488, 101st Cong., 2d Sess. 30 (1990). It is, of course, a fundamental principle of statutory construction that "Congress acts intentionally and purposely" when it "includes particular language in one section of a statute but omits it in another." *Keene Corp.*, 508 U.S. at 208 (quotation marks and citation omitted).[3]

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[3] For similar reasons, petitioners are incorrect to contend that, because Section 302(b)(2) of the ADA, 42 U.S.C. 12182(b)(2), covers only parties identified in Section 302(a), the same limitation should

Moreover, the floor debates and hearings show that Congress was well aware that omitting the owner, lessor, lessee or operator limit from Section 303 would make it possible for persons other than owners, lessors, lessees and operators to be held liable. Thus, Representative DeLay specifically noted that the ADA would permit "suit against * * * contractors" who were about to build an inaccessible facility, 136 Cong. Rec. 10,457 (1990), and groups representing architects and contractors recommended certain modifications to the Act to give them greater certainty regarding the specific design requirements being imposed. See H.R. Rep. No. 485, pt. 2, *supra*, at 125-126; *Americans with Disabilities Act of 1989: Hearings on H.R. 2273 Before the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 308-309, 314-315, 444-446 (1989) (American Institute of Architects); 136 Cong. Rec. 11,475 (1990) (Rep. Hoyer); *id.* at 11,461-11,462 (Rep. Schroeder).

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be read into Section 303. Pet. 11-12. That argument ignores the fact that Congress inserted the limitation to owners, lessors, lessees and operators only into Section 302, and not into Section 303, after the two provisions had been separated into separate sections. It ignores the different purposes and substantive scope of the two provisions. See pp. 10-12, *supra*. And it ignores the fact that—because Section 302(a) and (b) cover the same entities, while Section 303 covers additional entities (commercial facilities) not covered by Section 302—the limitation of Section 302(a) can be applied to Section 302(b) without untoward effect, whereas applying it to Section 303 would produce an incongruous gap in coverage. See pp. 12-13, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1998

UNITED STATES OF AMERICA,
Respondent,

v.

DAYS INNS OF AMERICA, INC. AND HFS INCORPORATED,
Petitioners.

Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF THE INTERNATIONAL FRANCHISE ASSOCIATION AS *AMICUS CURIAE* SUPPORTING PETITIONER

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CONSENT TO FILE
AMICUS CURIAE BRIEF

The International Franchise Association has obtained written consent from counsel of record for the Petitioners, Days Inns of America, Inc. and HFS Incorporated, and for the Respondent, the United States of America, to file this *Amicus Curiae* Brief in support of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. The written consent of each party's counsel is attached to the Certificate of Service filed simulteneously herewith.

INTEREST OF THE *AMICUS CURIAE*

The International Franchise Association ("IFA") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari by Days Inns of America, Inc. and HFS Incorporated (collectively, "DIA").[1] IFA supports the petitioner's position that the United States Court of Appeals for the Eighth Circuit erred in holding that DIA could be liable under Section 303 of the Americans With Disabilities Act, 42 U.S.C. § 12183, for noncompliance with the ADA by a franchised Days Inn hotel.

IFA was founded in 1960. It is the oldest and largest association in the world representing the interests of franchising. IFA's current membership includes more than 700 franchisors in over 60 industries. IFA opened membership to franchisees in 1993, and today has franchisee members representing more than 30,000 franchised outlets. IFA serves as a resource center for current and prospective franchisors and franchisees, state and federal government agencies, and the public. IFA also represents the interests of franchising before legislatures, courts and the public.

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[1] Counsel for DIA did not author this brief in whole or in part. Neither DIA nor any other person or entity made a monetary contribution to the preparation of this brief, other than indirectly by payment of normal membership dues to IFA.

DIA's petition is of vital interest to IFA and its members. This case turns on a federal statutory question of general applicability to franchisors. An estimated 600,000 franchised outlets are operating in the United States today – a substantial proportion of them designed and constructed after the ADA's new construction standards took effect. Thousands more are developed every year. Moreover, franchise agreements commonly contain controls over design and construction similar to those in the Days Inn franchise agreement at issue in this case. Accordingly, the Eighth Circuit's decision that DIA could be liable under Section 303 for its franchisee's failure to design and construct a franchised hotel in compliance with the ADA has broad implications for franchising.

IFA will not reiterate DIA's legal arguments in support of its petition. Instead, this brief addresses practical and public policy considerations that IFA believes should inform this Court's decision whether to accept the case.

REASONS FOR GRANTING THE PETITION

I. THE QUESTION OF FRANCHISOR LIABILITY FOR FRANCHISED FACILITIES UNDER SECTION 303 OF THE ADA HAS BROAD ECONOMIC IMPLICATIONS.

Franchising is a major force in the U.S. economy. It is estimated that at least 40% of all retail sales are made from outlets of franchised networks. Thousands of franchisees start up new businesses every year, adding to the 600,000 franchised outlets already in operation. The question of franchisor liability under Section 303 therefore directly affects a vast number of franchise relationships and, through them, a huge segment of the economy.

A franchise is a contractual relationship in which the franchisor, the owner of a business concept and associated trademarks or service marks, authorizes an independent franchisee to conduct business under the franchisor's marks using the franchisor's format and business methods. The franchise relationship is a careful balance of risks and rewards. The franchisee reduces its risks by affiliating with a recognized name and business concept; the franchisor reduces its risks by not having to furnish the labor and capital for the franchised location. In exchange for the reduced risk, each party accepts a lesser reward than it might have obtained by acting independently: the franchisee typically pays a small percentage of its gross sales to the franchisor as an ongoing royalty, and the franchisor accepts the royalty in

lieu of the net income it might have earned from operating a company-owned business at the location.

The Eighth Circuit's ruling fundamentally alters the balance of risks and rewards that underlies franchise relationships. It equates the legal risk of the franchisor with that of the franchise owner, without the potential rewards of ownership – and thereby curtails the incentive to franchise at all. In the hundreds of thousands of franchise agreements in place today, the initial franchise fee and ongoing royalty were set based on the assumption that franchisees would be responsible for their own regulatory compliance, including compliance with the ADA. That assumption is legitimate; for example, federal, state, and local governments have never required franchisors to obtain building permits or business licenses for franchisees' businesses. The payments due to the franchisor under the franchise agreement do not take into account the unanticipated compliance burden that the Eighth Circuit's decision imposes, nor the litigation cost that will surely result from the decision.

The franchisor inevitably has less incentive to share profits with franchisees – *i.e.*, to grant franchises – if the franchisor will have to bear the same burdens as if it owned the franchised facility. This increased exposure, at a minimum, would lead to higher costs for new franchise investors, as franchisors increase fees to offset their new obligations. As a result, fewer entrepreneurs would garner the advantages of self-employment, the enhanced credibility gained by association with the name and quality standards of a franchise system, and the opportunity to

avoid costly mistakes that the franchisee might otherwise make in operating on its own.

The Eighth Circuit's interpretation of Section 303 thus threatens serious dislocations in franchising. Moreover, as set forth in detail in DIA's petition, conflicting interpretations of Section 303 seem destined to collide in the federal circuit courts of appeal. This Court could easily prevent these unnecessary and undesirable effects by issuing a writ of certiorari to review the erroneous Eighth Circuit decision.

II. THE EIGHTH CIRCUIT'S DECISION IGNORES PRACTICAL AND LEGAL LIMITATIONS ON FRANCHISORS' ABILITY TO CONTROL ACCESSIBILITY OF FRANCHISED FACILITIES.

The Eighth Circuit concluded that DIA had sufficient control over design and construction of the hotel in Wall, South Dakota to incur liability under Section 303.[2] The Eighth Circuit, however, missed or chose to ignore at least two fundamental realities of franchise arrangements. First, the Eighth Circuit failed to recognize the limited purpose of the franchisor's controls over design and construction of a franchised outlet: to maintain the

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[2] IFA expresses no view on whether the hotel was or was not in compliance with the ADA, an issue that DIA stipulated solely for purpose of the appeal and that the Eighth Circuit accordingly did not reach.

franchise network's brand identity (including both the appearance of the outlet and its capacity to deliver goods and services consistent with other network outlets). Second, the Eighth Circuit failed to acknowledge the franchisor's legal inability to carry out the responsibilities that its decision imposes on franchisors under the ADA.

Franchising concededly involves contract rights that are not typically present in non-franchised distribution arrangements. Such rights relate directly to the desired end product of a franchise system: to convey a uniform image and consistency of service to the public. In order to maintain uniformity of its image, the franchisor must prescribe standards for the appearance of franchised outlets and must have the means to confirm that the franchisee meets those standards.[3] DIA did no more than this in its franchise agreement with the South Dakota franchisee. The contract was not designed to give DIA affirmative obligations for, or control over, compliance with applicable laws; indeed, like most franchise agreements, the Days Inn contract specifies that the franchisee alone is responsible for such compliance (and DIA's Planning and Design Standards Manual further

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[3] Under the Lanham Act, a trademark owner must control the nature and quality of the goods and services offered by its trademark licensees; failure to do so may jeopardize the owner's trademark rights. *See* DIA's Petition at 7; 15 U.S.C. §§ 1055, 1064, 1127. *See also Taco Cabana International, Inc. v. Two Pesos, Inc.*, 932 F.2d 113, 120-21 (5th Cir. 1991), *aff'd*, 112 S. Ct. 2753 (1992); *Kentucky Fried Chicken Corp. v. Diversified Packaging Corp.*, 549 F.2d 368, 387 (5th Cir. 1977).

specifies that the franchisee is responsible for ADA compliance). The interest of DIA and other franchisors in reserving rights with respect to the design and construction of franchised outlets is solely to maintain a uniform system image and to protect the goodwill associated with the franchisor's trademarks. This legitimate franchisor interest should not become a trap for liability under the ADA or any other legal requirements relating to design and construction of a franchised outlet.

Instead of acknowledging the limited purpose and effect of DIA's contractual controls, the Eighth Circuit adopted an approach under which franchisors would be fair game for all manner of claims by third parties based on a franchisee's failure to comply with applicable laws. For example, franchise agreements also typically contain controls over the form and content of the franchisee's advertising, to ensure that the image that the franchisee presents to the public in advertising is consistent with the standards of the franchise network. These rights of control do not constitute an undertaking by the franchisor that the franchisee's advertising will comply in all respects with consumer protection laws. Similarly, reserving limited rights of control over design and construction of the franchisee's facility should not be treated as a legal obligation of the franchisor as to the facility's accessibility.

The Eighth Circuit also failed to recognize that franchisors like DIA have no practical means to ensure that franchised premises comply with the ADA. This distinguishes franchisors from business owners, operators, landlords, and tenants. Since each of these entities either

holds legal title to the premises or occupies the premises, they have the legal right and ability to comply with the ADA by directing changes to the property. That is not the case with franchisors vis-à-vis their franchisees' premises. Except in cases where they lease premises to their franchisees, franchisors do not hold title to the premises, have no security or lien interest in them, and do not occupy them. Although franchisors have the right to review their franchisees' operations to ensure compliance with the franchise agreement, franchisors are without any legal right to *trespass* upon the premises of their franchisees' businesses to reconstruct those premises to conform to the ADA's requirements. That right belongs solely to the franchisee as occupant of the premises, or, in the case of leased premises, to the landlord.

The Eighth Circuit concluded that DIA's power to terminate the franchise agreement for material breach "would have enabled DIA to ensure ADA compliance." *United States v. Days Inns of America, Inc.*, No. 98-1243 (8th Cir. August 6, 1998), slip op. (Appendix to DIA's Petition at B-8). This view is mistaken. Franchise agreements do frequently obligate the franchisee to comply with applicable laws; thus, if a franchisee fails to comply with the ADA, it may be in breach of its franchise agreement. But the franchisor would then only have the right to notify the franchisee of its breach, which customarily initiates a specified period within which the breach may be cured. Only if the franchisee failed to cure the breach within the applicable cure period could the franchisor lawfully terminate the franchise agreement. Furthermore, whether or not a cure period applies, if the

particular ADA violation is not sufficiently material to the franchise relationship that the franchisee would be deemed to have committed a material breach, no power to terminate the franchise agreement arises.

In any case, termination of the franchise agreement is not an effective mechanism for enforcement of the ADA. Many violations of the ADA are not clear-cut. If the franchisor simply terminates the franchise agreement based on its own determination that the franchisee is not in compliance with the ADA, it could be exposing itself to substantial liability for wrongful termination if its determination is later found by a court or arbitrator to be erroneous. If, on the other hand, the franchisor first seeks a declaration that the franchisee is in breach, the franchisor has to prove both the franchisee's noncompliance and materiality. Until it has established both elements, which could require a trial and one or more appellate proceedings, the franchisor is without power to terminate.

The Eighth Circuit's reliance on the franchisor's right to terminate is based on the unstated and faulty assumption that franchise systems are "command and control" regimes. In practice, franchisors primarily obtain compliance with system standards, not by issuing threats of termination, but by means of persuasion, negotiation, and instilling franchisees' confidence in the franchisor's system. The franchisor is not a "corporate headquarters" that can order franchisees to carry out physical alteration of their premises as if they were the franchisor's employees; the franchisor must deal with its franchisees as the independent contractors and business owners that they

are, within the scope of an ongoing, arm's-length commercial relationship defined by a franchise contract. A franchisor has no inherent right, and rarely has a contractual right, to take the action necessary to comply with the laws applicable to a franchisee's business, including the ADA. And once the franchise is terminated, the relationship of the franchisor and the franchisee ends. The franchisor might sue to collect monies owed by the franchisee, to compel de-identification of the franchisee's business, or to secure the return of its operations manual, but in all other respects, the relationship has ended and compliance by the franchisee with laws applicable to the business is no longer of concern to the franchisor or within its power to effect.

In short, the right of a franchisor to terminate a franchise agreement for a material breach cannot be equated with an obligation to directly comply with the law with which the franchisee has failed to comply. Threatening termination every time a franchisee fails to comply with a contractual requirement is not a practical approach for a franchisor that desires to manage its franchise network for growth and success. The Eighth Circuit simply expects too much of franchisors by, in effect, asking them to invoke their termination rights as leverage to compel ADA compliance by franchisees. And the Eighth Circuit could not really intend franchisors to

carry through on the threat of termination, since the franchisor's leverage disappears once termination occurs.[4]

Since franchisors who neither own nor lease their franchisees' premises have no practical means of enforcing compliance with the ADA by their franchisees, Congress could not have intended franchisors to be liable parties under Section 303. Interpreting the statute otherwise would lead to the absurd result of subjecting franchisors to liability under a law with which they cannot effectively comply. *See. e.g., Carpenters District Council of New Orleans & Vicinity v. Dillard Dept. Stores, Inc.*, 15 F.3d 1275, 1285 (5th Cir. 1994) ("A well-accepted canon of statutory construction requires the reviewing court to avoid any interpretation that would lead to absurd or unreasonable outcomes"); *H. Wayne Palmer & Assoc. v.*

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[4] In its brief to the Eighth Circuit, the Department of Justice ("DOJ") stated that a franchisor would fulfill its obligation under Section 303 by terminating the franchise agreement, even if the franchisee persisted in conduct violating the statute. This statement only highlights the futility of termination as an enforcement mechanism. Terminating the franchise agreement might satisfy DOJ's urge to punish ADA violators, but it would do nothing to remedy inaccessible conditions at franchised premises. Termination would leave both the franchisor and the franchisee significantly worse off, because they would forfeit most or all of the considerable resources invested to identify and qualify each other as business partners, to negotiate and sign the franchise agreement (and possibly ancillary agreements), to locate and obtain the site of the franchise, to arrange financing, to deliver and attend training programs, to develop the franchised facility, to recruit employees, and to undertake a myriad of other steps to prepare the franchise for business. This loss would occur with *no* offsetting benefit to persons with disabilities.

Heldor Indus. Inc., 839 F. Supp. 770, 779 (D. Kan. 1993) ("A construction of a statute should be avoided which would attempt to require the performance of an impossible act").

III. HOLDING FRANCHISORS RESPONSIBLE FOR THE CONDITION OF FRANCHISED PREMISES IS NOT NECESSARY FOR EFFECTIVE ENFORCEMENT OF SECTION 303.

One remarkable aspect of the Eighth Circuit's opinion is its lack of any explanation why franchisor liability for franchised premises under Section 303 is necessary for effective enforcement of the statute. As the cluster of cases filed by the Department of Justice against DIA amply demonstrates, there is always another party – namely, the franchisee – who owns and operates the franchised business and who, unlike the franchisor, is capable of physically bringing the premises into compliance with the ADA. There is no reason to believe that suits against the owner and operator of the franchised facility will not be an effective means to secure ADA compliance.[5]

If the assumption underlying the Eighth Circuit's judgment is that a franchisor is better able than its

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[5] *See United States v. Days Inns of America, Inc.*, Civ. Action No. 96-26 (E.D. Ky. September 30, 1998), slip op. (Appendix to DIA's Petition at F-2) (franchisee and other defendants who settled with the DOJ "agreed with Plaintiff to make all necessary repairs to conform to ADA standards . . .").

franchisees to bear the cost of ADA compliance, that assumption is unreliable. In fact, the opposite is true: franchisees will generally be better able to afford the cost of compliance for their individual units than will a franchisor for *all* of its franchised units.[6] If, instead, the rationale is to force franchisors to act as a private ADA police force over their franchisees, the Eighth Circuit cited no evidence of any such intention by Congress. Moreover, as discussed in Section II above, franchisors are not in a position to be effective ADA enforcers with respect to franchised facilities.

IV. THE EIGHTH CIRCUIT'S DECISION ON FRANCHISOR LIABILITY UNDER SECTION 303 DISCOURAGES VOLUNTARY EFFORTS BY FRANCHISORS TO PROMOTE ACCESSIBILITY OF NEW FRANCHISED FACILITIES.

IFA and its franchisor members fully support the desire of the Department of Justice to encourage compliance with the ADA's accessibility requirements. Franchisors acknowledge their responsibility for the compliance of facilities that they own, lease, or operate. In addition, many franchisors have voluntarily taken steps to educate their franchisees about the ADA. Franchisors, however, have no natural advantage over their franchisees in interpreting and understanding the ADA's requirements.

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[6] DIA, for example, licenses over 1,700 facilities. *See United States v. Days Inns of America, Inc.*, No. Civ. S-96-260 (E.D. Calif. January 8, 1998) (Appendix to DIA Petition at D-1).

Franchisors' design expertise and design function focus on system standards, as discussed in Section II. Although franchisors can sometimes draw on their experience with other company-owned or franchised outlets to provide information that may be useful to franchisees, or to guide franchisees to consultants who specialize in ADA matters, franchisors do not hold themselves out as experts regarding the ADA or other laws affecting design and construction of franchised facilities.

The Eighth Circuit held that DIA bears responsibility for the failure to design and construct the Wall, South Dakota hotel in compliance with the ADA if DIA had actual knowledge of an ADA violation. The court apparently believed that adopting this standard would enhance the level of compliance with the ADA at franchised facilities. Unfortunately, the ruling is likely to have the opposite effect, because it will discourage franchisors from taking affirmative steps to educate and assist franchisees.[7] Under the Eighth Circuit's ruling,

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[7] The Department of Justice's interpretation of Section 303 would have a similar effect. DOJ argued in the Eighth Circuit, and presumably would argue to this Court, that its interpretation of Section 303 furthers the goals of the statute by giving franchisors a strong incentive to ensure that franchised facilities comply with the ADA. However, DOJ also stated its view that a franchisor is *not* liable for franchised premises under Section 303 if the franchisor does not reserve contractual authority over design and construction; merely instructing the franchisee that its facility must comply with the ADA is not sufficient for liability. Given a choice between risking judgment on the compliance of franchised premises and surrendering authority over design and construction, franchisors might well conclude that the latter method is an easier and more certain route to avoiding ADA

franchisors are better off putting their heads in the sand, avoiding involvement that might later be deemed to demonstrate the franchisor's "knowledge" of an ADA violation at a franchised facility. This perverse incentive is likely to result in less, not greater, compliance with accessibility standards at franchised facilities.

IFA believes that franchisors should instead be encouraged to take an active role in helping franchisees make their businesses accessible to persons with disabilities. In order for franchisors to assume this role, such involvement must not expose the franchisor to liability if, despite the franchisor's efforts to promote full compliance, the franchisee's facility falls short of ADA requirements.

In theory, one means to reduce the disincentive to franchisor involvement created by the Eighth Circuit might be to delete the "knowledge" element imported into Section 303 by the court. But the Eighth Circuit clearly was not comfortable with a strict liability standard for franchisors under Section 303. Such discomfort is well justified, for the reasons expressed in Section II and footnotes 4 and 7 of this brief. The only other means to eliminate the Eighth Circuit's roadblock to franchisors' voluntary ADA education efforts is to correct the Eighth Circuit's erroneous interpretation of Section 303. IFA believes that DIA's interpretation of Section 303, under

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liability. Thus, DOJ's interpretation of Section 303 would only encourage franchisors to cleanse their design and construction standards of provisions that implicate the ADA.

which franchisors would be liable only when the franchisor is the owner, lessor, tenant, or operator of the franchised facility, would free franchisors to assist their franchisees on ADA matters and thereby enhance ADA compliance within franchise networks.

CONCLUSION

Based on the foregoing considerations of business practice and public policy, IFA respectfully requests that this Court grant DIA's petition for a writ of certiorari.

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October Term, 1998

DAYS INNS OF AMERICA, INC.
AND HFS INCORPORATED,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Days Inns of America, Inc., and HFS Incorporated respectfully submit this reply brief in support of their petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

ARGUMENT

I. The "Interlocutory" Nature Of The Eighth Circuit's Decision Does Not Weigh Against Review By This Court.

The issue presented by this Petition is purely a question of law: What parties may be held liable under Section 303 of the Americans With Disabilities Act? Although the Eighth Circuit remanded this case to the district court to determine whether Petitioners had "actual knowledge" of ADA violations at the Wall Facility, that question has no bearing on the issue presented by the Petition. Because the legal issues presented on appeal are fully-developed, this case is ripe for review by the Supreme Court. *See Atherton v. F.D.I.C.*, 519 U.S. 213 (1997) (review on writ of certiorari of a decision on an interlocutory appeal where the case focused on a legal issue); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (granting interlocutory certiorari where the "correctness of the decision of the court below depends upon the scope and meaning" of a constitutional provision).

This Court has reviewed "interlocutory" decisions to address issues that are "fundamental" to further proceedings. For example, in *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949), the Court granted a petition for writ of certiorari to review a circuit court decision reversing and remanding a district court's grant of preliminary relief. Noting that, "The judgment of the Court of Appeals was not a final one," the Court stated, however, that, "[W]e

considered it appropriate for review here since, in our view, the jurisdictional issue was 'fundamental to the further conduct of the case.'" 337 U.S. at 685 n. 3, *citing Land v. Dollar*, 330 U.S. 731, 734 (1947). *See also United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) (review of appellate court decision remanding case for trial where ruling was "fundamental to the further conduct of the case"); *Randolph Cent. School Dist. v. Aldrich*, 506 U.S. 965 (1992) ("[W]here there is an important and clear-cut issue of law that is fundamental to the further conduct of the case and that otherwise would qualify as a basis for certiorari, interlocutory status need not preclude review.") (White, J., *dissenting* from denial of certiorari) (citations omitted). The question to be resolved is whether a party that does not own, operate, or lease a facility may be held liable under Section 303 of the ADA. Review by the Court may obviate the need for further proceedings between these same parties now pending, in addition to this case, in two federal district courts and two federal courts of appeals and will assure that the issue can be resolved consistently in those pending proceedings. The issue presented by this Petition is, thus, plainly "fundamental" in nature.

Further, although Respondent characterizes the question presented by the Petition as "novel," the proper interpretation of Section 303 is a matter of general public interest, affecting far more than just the parties to this case, as the brief of *amicus curiae*, the Internation..! Franchise Association, demonstrates. First, the question of who may be held liable under Section 303 of the ADA is obviously one of great importance for franchisors and franchisees. Second, given the very significant role that franchising plays in the nation's economy, this issue also affects the general public. Finally, the impact of the Eighth Circuit's decision concerning liability under Section 303 is not limited to franchising, but reaches

any entity that might have some involvement in the design and construction of a facility.

II. The Eighth Circuit's Decision Fails To Give Effect To The Plain Language Of The Statute.

Respondent urges the Court to reject an interpretation of Section 303 that limits the reach of that section to owners, operators, lessors, and lessees because "federal courts are under a 'duty to refrain from reading a phrase into the statute when Congress has left it out.'" (Opposition at 13, citations omitted.) Yet this is precisely what Respondent's interpretation of the statute does.

Respondent contends that, because Section 303 does not identify responsible parties, Congress must have intended that any party engaging in "prohibited conduct" could be held liable. (Opposition at 9.) The statute does not, however, prohibit the design and construction of inaccessible facilities, as Respondent appears to believe. Rather, it prohibits the failure to design and construct facilities that are accessible. Thus, when a facility is inaccessible, there is no logical limit, based on the language that describes the prohibited conduct, on the parties who are liable. In other words, when a facility is not accessible, anyone and everyone has "failed" to make it accessible. Anyone and everyone has engaged in prohibited conduct. Anyone and everyone is liable.

Plainly, this is not what Congress intended. In order to avoid what would be a patently absurd result, but also avoid Section 303's reference to Section 302(a), it is Respondent that reads into the statute a limitation on liability that is nowhere to be found in the plain language. Respondent contends that "anyone . . . with the requisite interest, authority, and control" may be held liable for failure to design

and construct an accessible facility." (Opposition at 9.) Respondent, thus, recognizes that, without some limitation on the scope of liable parties, liability is so broad as to be rendered meaningless. In order to save an interpretation that does not limit Section 303 to owners, operators, lessors, and lessees of covered facilities, it is Respondent, not Petitioners, that has attempted to "rewrite" the statute.

An interpretation that incorporates Section 302(a) into Section 303 gives effect to all of the plain language of the statute in a way that reasonably limits the scope of liability without "implying" additional language to avoid an absurd result. As discussed in the Petition, Section 303's use of the phrase "as applied to public accommodations and commercial facilities" unambiguously applies the requirements of Section 303 to both public accommodations and commercial facilities. (Petition at 13-14.) This language, thus, avoids the "coverage gap" claimed by Respondent to arise from an interpretation that incorporates Section 302(a)'s identification of liable parties as part of Section 303. Respondent has no response to this argument.[1]

Further, the interpretation urged by Respondent is unworkable practically. The statute does not use, much less define, the concepts of "requisite interest, authority, and control" over design and construction. Indeed, even the way in which Respondent has formulated the legal test — "requisite interest, authority, and control" — shows how ill-defined that test is. Respondent's interpretation provides the public, which must comply with the statute, and the courts,

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[1] Nor does Respondent respond to the argument that the phrase "design and construct" was intended to establish the effective date of the new construction provisions of the Act (*i.e.* "design and construct for first occupancy later than 30 months after the date of enactment of the Act.").

which must apply the statute, with absolutely no guidance on how much "interest, authority, and control" over design and construction is enough to trigger liability. It is unreasonable to think that Congress, on the one hand, intended to create "clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities" (42 U.S.C. § 12101(b)(2)) and, on the other, defined the scope of liability in such a way as to ensure virtually endless litigation over whether a party had sufficient control over design and construction to make that party liable.

In contrast, the party or parties who own, operate, or lease a facility would be, in most cases, easily identifiable. Holding those parties liable when newly constructed facilities are inaccessible would, unlike the interpretation advocated by Respondent, further Congress's goal of creating "clear, strong, consistent, enforceable standards" and encourage compliance. In fact, in each of the cases brought by Respondent against Petitioners, the owner/operator of the facility was also a defendant and in each case the owner/operator entered into an agreement with Respondent under which it agreed to make modifications necessary to bring the facility substantially, if not completely, into compliance with the requirements of the ADA.

III. Respondent Misconstrues The Legislative History.

Respondent argues that, because Congress included the "owns, leases (or leases to) or operates" language as part of Section 302 and not Section 303, this reflects an intent to make parties other than owners, operators, lessors, and lessees liable under Section 303. (Opposition at 14.) This argument is misplaced. As discussed in the Petition, Congress described Section 302(a) as the "General Rule of Title III." (Petition at 23.) Congress intended this "General Rule" to

apply to both Section 302 and 303. Having amended the General Rule, there was no reason for Congress to amend Section 303, any more than there was a reason to amend 302(b), because both Sections explicitly referred back to Section 302(a).

Further, Respondent cites, in support of its characterization of the legislative history, not authoritative legislative history, but rather, comments made in floor debates and comments made in public hearings by representatives of the American Institute of Architects. Reliance on these comments, as opposed to the authoritative legislative history, is misplaced. First, comments made by people who are not members of Congress, such as representatives of the American Institute of Architects, plainly do not reflect the views of Congress and are not properly considered legislative history. *Kelly v. Robinson*, 479 U.S. 36, 50 n.13. (1986). Second, the Court eschews reliance on passing comments and casual statements made by individual members of Congress in floor debates in determining Congressional intent. *Garcia v. United States*, 469 U.S. 70, 76 (1984). *See also Zuber v. Allen*, 396 U.S. 168, 186 (1969) ("A committee report represents the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation. Floor debates reflect at best the understanding of individual Congressmen.") *Cf.* Petition at 20 (discussing reports of House and Senate committees).[2]

[2] Respondent's one citation to an official committee report addresses a process for obtaining certification that a state law or local building code meets or exceeds the minimum requirements of the ADA. This provision, reported the House Committee on Education and Labor, "is intended simply to allow builders and architects to use codes and laws with which they are familiar." House Report No. 101-485(II) at 126, *reprinted at* 1990 U.S.C.C.A.N. at 409. This statement, of course, is not inconsistent with interpreting Section 303 to hold only owners, operators, lessors, and lessees liable. Even though not directly liable for violations of the ADA,

Finally, to the extent the Court gives weight to comments made in floor debates, statements by Representative Hamilton Fish of New York, reflect the understanding of one of the bill's sponsors that it would be owners and operators who would be liable for failure to design and construct accessible facilities. (*See* Petition at 21-22.)

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architects and builders would still, presumably, be liable to building owners for professional negligence if they designed and built a facility that did not comply with the law and would still have an interest in complying with the requirements of the ADA to avoid such potential liability.

CONCLUSION

For the foregoing reasons and for the reasons set out in the Petition, Days Inns of America, Inc., and HFS Incorporated respectfully request that their Petition for Writ of Certiorari be granted.

Dated: March 1, 1999

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